



**Streaming Unauthorised Copyrighted Content: Copyright
Liability of Streaming Platforms and Streaming Box
Distributors. A Comparative EU-US-SA Perspective**

by

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PNKFEL001

Submitted to the **University of Cape Town**

In partial fulfilment of the requirements for the degree of

Masters in Law: Intellectual Property Law Specialisation

Department of Commercial Law

Faculty of Law

University of Cape Town

Date of Submission: 19 February 2018

Supervisor: Dr. Tobias Schonwetter

Word Count: 24.953

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Abstract

This thesis examines the liability for copyright infringement of streaming platforms and streaming box distributors in the EU, U.S. and in South Africa. As there have been no reported cases in South Africa in which copyright holders have instituted legal proceedings concerning copyright infringement against streaming platforms or streaming box distributors, this thesis analyses and compares the legal context in the EU and the U.S., in order to develop an appropriate approach for lawmakers and courts in South Africa regarding this issue.

It concludes that the approach of the European Court of Justice with regard to the communication to the public right leads to legal uncertainty and should not be followed. Instead, it is suggested that South Africa implements into its Copyright Act of 1978 parts of the U.S. approach in terms of secondary liability.

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A. INTRODUCTION

In recent years, streaming media has taken on increasing significance, while the use of file-sharing software like BitTorrent and similar technologies reduces. In 2016 streaming video and audio accounted for 71% of total Internet traffic during peak periods in North America.¹ In Europe traffic from this group accounted for over 45% in 2015, while file-sharing only comprised 7%.² In contrast, in 2011 (P2P) file-sharing in Europe still accounted for 30% of Internet traffic.³ On the one hand, this decrease is due to the availability of authorised streaming services such as Netflix or Spotify. On the other hand, streaming also occurs on streaming platforms that offer free content without permission of the copyright holders.

This thesis will focus on the issue of streaming unauthorised copyrighted content through an examination of copyright law. There have been no reported cases in South Africa in which copyright holders have instituted legal proceedings concerning copyright infringement against streaming platforms or streaming box distributors. However, it may just be a matter of time before such cases emerge. The aim of this thesis is to develop an appropriate approach for lawmakers and courts in South Africa regarding the issue of the liability of streaming host providers and streaming box distributors. For this purpose, the current legal context of two of the largest digital media markets⁴, namely the European Union and the United States, will be analysed and compared. They both take a different approach with regard to the liability of streaming platforms and streaming distributors, which is why a comparison is useful in revealing the advantages and disadvantages of each approach.

¹ Sandvine (2016). Global Internet Phenomena. North America, Fixed Access, p. 4. Available at: <https://www.sandvine.com/downloads/general/global-internet-phenomena/2016/global-internet-phenomena-report-latin-america-and-north-america.pdf>.

² Sandvine (2015). Global Internet Phenomena. Europe, Fixed Access, p.2. Available at: <https://www.sandvine.com/downloads/general/global-internet-phenomena/2015/global-internet-phenomena-report-apac-and-europe.pdf>.

³ Sandvine (2011). Global Internet Phenomena Spotlight. Europe, Fixed Access, Spring 2011, p. 8. <http://www.scribd.com/doc/55777280/Sandvine-Internet-Phenomena-Report-Spring-2011>.

⁴ In terms of revenue the U.S. ranks 1st and the U.K. and Germany 4th and 5th (Statista ‘Global Comparison – Revenue in the “Digital Media Market”’).

The thesis will firstly examine the liability of streaming platforms and streaming box distributors under European copyright law. Emphasis will be placed on the recent CJEU judgement in the *Filmspeler*-case (C-527/15), which dealt with the liability of streaming box distributors, and the *Pirate Bay* case (C-610/15), which affected the interplay between primary and secondary liability for copyright infringement in the EU. I will then compare the legal situation in the EU to the legal context in the US. Finally, this thesis will examine the current South African legislative framework, inclusive of the Copyright Amendment Bill 2017, and propose what the law maker and courts could learn from the European and US approaches regarding this issue.

Much of this thesis will deal with secondary liability and its distinction from primary liability. In the context of a comparison of several jurisdictions, the term ‘secondary liability’ raises some definitional questions which have to be addressed at the outset. For the purposes of this thesis the term ‘secondary liability’ is meant to encompass situations where a person contributes to, induces, facilitates or is otherwise responsible for the direct infringement of a third party. Other common used terms for such conduct are ‘indirect’/secondary infringement’, ‘accessory liability’ or ‘contributory liability’⁵. I will use the term ‘secondary liability’ as an umbrella term that covers all of these terms. However, it should be noted that under South African copyright law, secondary liability and secondary/indirect infringement are two different concepts. This will be clarified in Chapter 5.

⁵ GB Dinwoodie *Secondary Liability of Internet Service Providers* 25ed (2017) 8.

CHAPTER 2. STREAMING AND ITS ACTORS

I. Technical background of media streaming

Streaming media as a technological process can be defined as the continuous delivery of audio, video, and/or text to the end-user over the internet.⁶ The content is displayed to the end-user while it is being delivered by the provider. Whereas downloading means that media files are permanently saved on the users computing device, streaming is media data transferred in a stream of packets without storing the whole file. Instead, the data is ‘buffered’, i.e. temporarily stored, in the cache. Usually the stored data will be deleted as soon as the browser is closed.⁷ Another major difference to downloading is that the media is continuously transmitted to the user while the content is already being consulted. When downloading a file, a user has to wait for the whole file to be saved on his computing device before the file can be accessed.⁸ The client/server model is the most common streaming media system. The client requests data from a server on a computer network. The server then delivers the data to the client who renders and displays the data. Usually the interpretation of such data is done by ‘players’ or streaming technologies such as Windows Media Player, Adobe Flash Player or Apple QuickTime Player.⁹

Essentially, there are two types of streaming that are used to disseminate works, namely live streaming and on demand streaming. Live streaming refers to streaming media that is simultaneously recorded and delivered in real time from a single source to multiple users.¹⁰ This form of streaming is also called webcasting. It is used to broadcast live events such as football games, conferences or real life activity in the context of social media (also called ‘lifecasting’¹¹). Furthermore, it encompasses webradio, web-TV and the retransmission of cable or satellite television programs via the internet.¹²

⁶ A DiStefano *Encyclopedia of Distributed Learning* (2003) 424.

⁷ S Karapapa *Private Copying* (2012) 11.

⁸ European Parliament Policy Department A: Economic And Scientific Policy ‘Streaming and online access to content and services’ 9, available at

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/492435/IPOL-IMCO_ET\(2014\)492435_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/492435/IPOL-IMCO_ET(2014)492435_EN.pdf) (accessed on 1 December 2017); Burroughs *Streaming media: audience and industry shifts in a networked society* PH.D. (2015) 1.

⁹ J Follansbee *Get Streaming!* (2004) xvi; see also European Parliament Policy Department A: Economic And Scientific Policy op cit (n8) 9-10.

¹⁰ M Borghi ‘Chasing Copyright Infringement in the Streaming Landscape’ (2011) 42 *IIC* 3.

¹¹ The term was first coined by Justin Kan the founder of justin.tv, see

<http://www.washingtonpost.com/wp-dyn/content/article/2007/03/28/AR2007032801719.html>.

¹² M Borghi op cit (n10) 3.

On-demand streaming, on the other hand, is streaming media that has been previously recorded and then made available. Unlike live streaming where the user has to watch at a specific broadcast time, on-demand streaming allows users to choose the time and select the content they want to watch/stream. Basically, every content that can be made available for download can also be made available through on-demand streaming. Popular on-demand streaming platforms include Netflix, Hulu and Spotify.¹³ The actual transmission of the data is similar both in live and on-demand streaming. The main difference is that on-demand streaming requires content to be uploaded onto a host server, so that the user can request the transmission, whereas live streaming encodes data from a source to a digital form and then delivers it to the multiple users without recording it first.¹⁴

To identify the main actors in terms of streaming one has to look at the chain of activities that occur. First, a content provider acquires an account with a host provider and uploads movies or music onto the host's server. Thereafter, anyone with a connection to the internet and with the necessary streaming technology (=users) can access and stream the content. In turn, the connection to the internet is provided by an internet access provider, such as Vodacom.¹⁵ The transmission and routing of the stream data is carried out by the network operator who provides the infrastructure to transmit a signal. Additionally, in some cases so-called streaming boxes, like Apple TV or Amazon Fire TV, are used to connect a source of content which is hosted online to a television screen. Therefore, streaming box distributors also play a role in the context of streaming. With regard to live streaming the same applies but as outlined above, media content is not hosted by a host provider.

II. Internet Intermediaries

As shown above, streaming involves several activities by intermediaries. Internet intermediaries benefit from liability exemptions under most copyright law regimes, e.g. the U.S. Digital Millennium Copyright Act (DMCA), the European Electronic Commerce Directive (ECD) or the Electronic Communications and Transactions Act (ECTA), which contain provisions that limit the liability of Internet Intermediaries.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ KJ Koelmann, PB Hugenholtz 'Online Service Provider Liability for Copyright Infringement' (1999) *Geneve: WIPO Workshop On Service Provider Liability* 3-4.

Therefore, an understanding is necessary of what Intermediaries are. As the word implies, the intermediary is located between two or more persons. Intermediaries provide services that enable people to use the internet and to engage in online interactions.¹⁶ The Organisation for Economic Co-operation and Development (OECD) proposes the following comprehensive and accurate definition:

‘Internet intermediaries bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.’¹⁷

Not all Internet intermediaries are relevant when it comes to unauthorised streaming of copyrighted on streaming platforms, such as ecommerce intermediaries or Internet payment system intermediaries. Outlined below are the Intermediaries that do play a role in the context of streaming.

1. Access providers

An access provider is a ‘company which provides end-users with a data connection allowing access to the internet and the associated services (World Wide Web, Email, Chat rooms, Instant Messaging, Internet Telephony and so on).’¹⁸ They also provide the necessary facilities for content providers to publish and distribute their content online. Since the services of internet access providers and network operators are inextricably linked and often provided by the same company, this thesis defines both as access providers. They may also provide additional services like hosting content and publishing own content online, e.g. America Online (AOL) or Vodacom.¹⁹ The data that the access provider is transmitting is carried through an automatic technical process. Therefore, the access provider usually does not have any knowledge and control of the content that they transmit and route to the end-user.²⁰ This is one of the reasons why many jurisdictions have implemented provisions that limit the liability of access providers.²¹ However, these provisions typically allow for injunctions against

¹⁶ JD Lipton *Rethinking Cyberlaw: A New Vision for Internet Law* (2015) 11.

¹⁷ OECD *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (2011) 21.

¹⁸ OECD *Access Pricing in Telecommunications* (2004) 214.

¹⁹ OECD op cit (n17) 21.

²⁰ RH Weber ‘Internet Service Provider Liability: The Swiss Perspective’ 1 (2010) *JIPITEC* 145 at 147.

²¹ E.g. 17 U.S. Code § 512(a); Article 12 of The Electronic Commerce Directive (ECD) 2000/31/EC; s 73 of the South African Electronic Communications and Transactions Act (ECTA) 25 of 2002. The limitations of liability will be discussed in more detail below.

access providers.²² Thus, the main issue in the context of this thesis is whether or not access providers can be obligated to block access by their customers to those streaming platforms that host or link to copyright infringing material that is made available through streaming.

2. Host providers

Host providers make Internet storage space available to Internet users. Users may rent website space or upload text, audio or video data.²³ Most jurisdictions provide for limitations of liability for host providers, similar to those for access providers.²⁴ The several types of streaming platforms which will be discussed in this thesis are either host or content providers. However, this does not mean that they qualify as host providers within the meaning of the respective safe harbour provisions. In the following, the various forms of host providers in the context of streaming platforms will be discussed.

a. User-Generated-Content (UGC) streaming platforms

UGC sites provide a platform for users to upload and store their own content. They usually provide for a search function and specific design so that other Internet users are able to find and stream the UGC. The most well-known example of such a host provider is YouTube, the most popular UGC host provider in the world in terms of video content.²⁵ But also social network platforms such as Facebook can be seen as UGC streaming platforms as far as they make storage available to their users for uploading and posting their own streaming media.²⁶ Such host providers risk being held liable when UGC incorporates third-party copyright infringing content or if a whole third-party protected work (e.g. movie) is uploaded onto the website. In order to minimise the risk, some host providers (e.g. YouTube) implemented filtering mechanisms that automatically scan videos for third party copyright protected content.²⁷

²² 17 U.S. Code § 512(j); Article 12(3) ECD; s 73(3) ECTA.

²³ P Baistrocchi 'Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce' 19 (2002) *SCHTLJ* 111 at 116.

²⁴ E.g. 17 U.S. Code § 512(c); Article 14 of the ECD; s 75 of the ECTA.

²⁵ M Holland 'How YouTube Developed into a Successful Platform for User-Generated Content' (2016) 7 *EJURC* 53.

²⁶ See JB Nordemann 'Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach' 2 (2011) *JIPITEC* 37 at 38.

²⁷ YouTube's Content ID is such a filtering mechanism, <https://support.google.com/youtube/answer/2797370?hl=en>.

b. File hosts and file host streaming platforms

File hosts activities are limited to the mere provision of Internet storage. In contrast to UGC sites, they do not provide for a search function and particular structure for the storage. Some file hosts offer storage space against payment (e.g. SugarSync or Host4Africa), others allow internet users to upload content from their hard drive free of charge due to advertising revenue (e.g. Dropbox²⁸ or zippyshare). These services usually return a URL which can be published and given to other people.²⁹ Another type of file hosts are streaming video web hosts (e.g. streamcloud.eu or openload.co). These sites do not offer a search function but they encode the video and facilitate the streaming of the video.³⁰

c. Link-sharing streaming platforms

Link-sharing streaming platforms do not store the content themselves but make links available to content that is stored by a file host or streaming video web host.³¹ These sites offer a platform which categorises the content and enables users to search for specific content. For example, putlocker-9.co or 123movies.com provide for such a search function to find a specific movie. The vast majority of these sites links to current cinema movies that were uploaded without the authorisation of the copyright owners.³² Although these platforms might use different ways to organize their content, they all share the same characteristics: they allow popular movies and television shows to be streamed as embedded media within their website, while the actual content is being hosted by a file host.³³ The embedded links give the impression that the user is staying on the original website, even though the media is in fact delivered from a different host. Link-sharing hosts can be designed as UGC sites, which means that the users post the links, or the website owners provide the links as their own content. In the latter case, such platforms are considered content providers.

²⁸ Dropbox actually uses a so-called 'freemium business model', where a set amount of storage size is offered for free and additional space and features are available against payment; see <https://www.dropbox.com/help/space/dropbox-plus>.

²⁹ JB Nordemann op cit (n26) 38.

³⁰ See <http://streamcloud.eu>.

³¹ JB Nordemann op cit (n26) 38.

³² See for example *Paramount v Sky* 2 UK EWHC 937 (Ch).

³³ D Balzarotti, SJ Stolfo, M Cova, *Research in Attacks, Intrusions and Defenses: 15th International Symposium* (2012) 171.

d. Link-indexing streaming platforms

Indexing host providers store indexes of digital content to make it easier for users to find specific content. Users can search the index and contribute to it.³⁴ A famous example, in the context of P2P filesharing, is The Pirate Bay. The Pirate Bay allows Internet users to search for Torrent Files which facilitate P2P-Filesharing amongst the users of BitTorrent client programs.³⁵ These Torrent file indexes are especially used to share copyright infringing content such as illegal copies of films and music.³⁶ Link-indexing streaming platforms, such as alluc.cc, are mainly designed as a search engine (similar to Google) for streaming links. They search all general video hosts for streaming content.

3. Content providers

A content provider initiates the decisions to disseminate the content and to make it available to the public online.³⁸ Hence, streaming platform operators who upload film or music onto their website or users who upload media with a file host are content providers. Since content providers initiate the decision to disseminate their own content, they are not regarded as internet intermediaries and consequently do not fall within the scope of the global safe harbour regimes/intermediary liability limitations. Obviously, in the case that a person uploads an infringing copy of a film or song, they can be held liable. However, the growth of participative internet platforms (UGC sites) – where platform owners encourage their users to publish and share their own content – has blurred the line between host providers and content providers.³⁹ The main question is whether a host provider appropriates the third-party content, so that it can no longer be seen as third-party content but as his own content. With regard to liability issues, the distinction between a host provider and content provider is of crucial importance because it determines whether the liability exemption for host providers applies. In this context, two main arguments are raised by copyright holders. First, a host provider that gains financial benefit from hosting copyright infringing material

³⁴ Ibid.

³⁵ A Sobolciakova *The Pirate Bay Liability* LL.M. (2011) 27.

³⁶ See *Stichting Brein v Ziggo* EU (CJEU) C-610/15.

³⁸ RH Weber op cit (n20) 146.

³⁹ OECD *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (2011) 21.

should at least be partly liable for such infringement.⁴⁰ Second, if the business model of a neutral host provider requires the storage of large amounts of UGC and if the host provider knows that some of them are infringing copyright law, then it should be responsible for not taking the content down.⁴¹

III. Streaming box distributors

Streaming boxes are standalone devices that run a specific software which allows its users to stream media from the Internet to their television screen or monitor. They act as a ‘medium between, on the one hand, a source of visual and/or sound data and, on the other hand, a television screen.’⁴² The software installed on the device provides for a ‘user-friendly’ interface and allows users to use their remote control to play and view streaming media content such as videos, music, live sports and podcasts.⁴³ Given that the software is usually open source various plug-ins exist which are freely available on the Internet. Some allow users to access legal streaming services such as Spotify, Netflix or YouTube. However, other plug-ins are specifically designed to give access to streaming websites that host or link to unauthorised copies of movies or music.⁴⁴

Usually, streaming boxes do not come with any plug-ins. However, some distributors developed a business model which is based on selling these streaming boxes with pre-loaded plug-ins that enable the users to stream live sports, movies or music – otherwise only available upon payment of a subscription fee - for free (e.g. Filmspeler⁴⁵ or Kodi boxes⁴⁶). These boxes are also advertised as being ‘fully loaded’ and as allowing users to watch movies ‘for free’.⁴⁷ With regard to liability issues, the main question is whether these distributors are directly or indirectly infringing copyright.

⁴⁰ Memorandum of Law in Support of Viacom’s Motion for Partial Summary Judgement On Liability and Inapplicability of the Digital Millenium Copyright Act Safe Harbor Defense submitted in *Viacom v Youtube and Google* No. 1 07-cv-02 103 (LLS) 50-61.

⁴¹ Ibid.

⁴² See *Stichting Brein v Ziggo* EU (CJEU) C-610/15 at para 15; with regard to the ‘Filmspeler’ player.

⁴³ A Bridy ‘Amazon’s Kodi Box Ban and Copyright Liability for Device Distributors’ (2017), available at <http://cyberlaw.stanford.edu/blog/2017/03/amazon-s-kodi-box-ban-and-copyright-liability-device-distributors> (accessed on 8 December 2017).

⁴⁴ J Blum ‘Stichting Brein v. Jack Frederik Wullems (Filmspeler)’ (2017) 3, available at <https://www.bristows.com/assets/pdf/LICL%20May-June%202017%20-%203-6.pdf> (accessed on 8 December 2017).

⁴⁵ See *Stichting Brein v Ziggo* EU (CJEU) C-610/15.

⁴⁶ A Bridy op cit (n43).

⁴⁷ D Price ‘What are Kodi Boxes and Is It Legal to Own One?’ (2017), available at: <http://www.makeuseof.com/tag/kodi-boxes-legal-own-one/> (accessed on 9 December 2017).

IV. Users

A user of streaming services is anyone who has access to the Internet and who requests the transmission of data packets to his computing device where it is displayed using a suitable media player. The number of individuals making use of legal streaming services such as Netflix, Spotify or Amazon Prime has increased drastically over the last years. For example, the average daily time spent with streaming digital video content among adults in the US increased from 35 minutes in 2012 to 72 minutes in 2017.⁴⁸ Increased availability of broadband connection and the ability to access internet from almost everywhere at any time are one of the reasons for this trend.⁴⁹ This also applies for South Africa, where the market entry of Netflix and Amazon Prime has led to more competition with local players like ShowMax and where more and more fibre-optic Internet providers make sure that South African households have the bandwidth speed to stream videos.⁵⁰ However, many users choose to stream from streaming websites that host or link to unauthorised copyright protected content.⁵¹ Yet, currently, laws and court decisions do not provide clear guidance as to whether users of such sites infringe copyright. Apart from the question of liability, one has to consider that – even if we assume that individual users are infringing copyright – copyright owners would for practical reasons rather seek to hold intermediaries liable for infringement. First, intermediaries are more likely to be financially capable of paying the fines and damages and, second, they are much easier to identify than the large number of individual users.⁵² With regard to the liability of streaming platforms and streaming box distributors, the question whether a user directly infringes copyright can determine whether the platform or streaming box distributor can be held liable for secondary infringement.⁵³

⁴⁸ Statista ‘Average daily time spent with digital video content among adults in the United States from 2012 to 2017, by device (in minutes)’, available at <https://www.statista.com/statistics/420799/daily-digital-video-content-consumption-usa-device/> (accessed on 8 December 2017).

⁴⁹ Ibid.

⁵⁰ LK Rawlins ‘Streaming search engine hits SA’ (2016), available at <https://www.itweb.co.za/content/R8OKdWMDD9VMbznQ> (accessed on 17 February 2018).

⁵¹ C Sterbenz ‘How Sketchy Streaming Sites Really Work — And Why Some Are Legal’ (2014), available at <http://www.businessinsider.com/are-streaming-sites-legal-2014-4>. (accessed on 8 December 2017).

⁵² O Dean and A Dyer *Introduction to Intellectual Property Law* (2014) 429.

⁵³ See discussion under Chapter 4 II.3.

CHAPTER 3: LIABILITY OF STREAMING PLATFORMS AND STREAMING BOX DISTRIBUTORS IN THE EU

I. EU Rules On Copyright Infringement

Before discussing the specific rules on intermediary liability, in particular the liability of host providers, it is necessary to outline the general rules on copyright infringement. This is because the ‘safe harbour’ regime of the ECD only applies in a negative fashion, i.e. only instructing Member States as to when intermediaries should not be held liable. It does not state when such liability should be applied. Therefore, it is necessary to examine whether an intermediary has actually infringed or participated in an infringement of copyright before looking at the limitations of liability.

The most important Directive with regard to rules concerning copyright infringement is the so-called ‘InfoSoc’ Directive (Directive 2001/29/EC), which harmonises most of the exclusive rights of the copyright owners. In particular, the rights of ‘communication to the public’⁵⁴, ‘making available’⁵⁵ and ‘reproduction’⁵⁶ can be found in the InfoSoc Directive. The dissemination of works online by way of streaming potentially implicates all three of these rights. The most relevant rights when it comes to websites hosting or linking to unauthorised streaming content are the ‘communication to the public’ right and the ‘making available’ right. The reproduction right is rather subject to the liability of persons who upload infringing content as they initiate the making of a copy on the host provider’s server. In the following, for the purposes of this thesis these two rights will be carefully assessed.

1. ‘Communication to the public’

As new technologies emerged in the latter part of the 20th century it was necessary for international copyright law legislators to create a new general right of communication to the public. Especially with the arrival of the Internet the broadcast right and distribution right were not able to cover all activities that developed online, like for example wireless transmission or on-demand services.⁵⁷ A general right of communication to the public was introduced by the WIPO Copyright Treaty (WCT)

⁵⁴ Article 3(1) of the Information Society Directive (InfoSoc) 2001/29/EC.

⁵⁵ Ibid.

⁵⁶ Article 2 of the InfoSoc Directive.

⁵⁷ PB Hugenholtz ‘Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without a “New Public”’ (2016) 47 *IIC* 798.

of 1996⁵⁸. This, in turn, formed the basis for Article 3(1) of the InfoSoc Directive which states that:

‘Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.’⁵⁹

The question of what exactly constitutes a communication to the public is not clearly defined. However, the recitals of the InfoSoc Directive provide some insight of what is meant by ‘communication to the public’. Some important background to this provision is given by recital 23. It provides that the authors’ right of communication to the public ‘should be understood in a broad sense covering all communication to the public not present at the place where the communication originates.’ Furthermore, the right applies to ‘any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.’ Thus, the decisive factor is whether the public to which the work is communicated is located in a different place from the place where the communication originates. This means that any local communication such as recitations or music performances do not fall under this right. On the other hand, it covers cable, broadcast and of course online transmission.⁶⁰ This broad definition is somewhat limited by recital 27 which stipulates that the ‘mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of [the] Directive’. However, the question of which act exactly constitutes the ‘mere provision of physical facilities’ is disputed. It could be argued that only the provision of hardware is covered, as opposed to the services that use them. On the other hand, one could say that the provision encompasses the services of other internet intermediaries as well.⁶¹ This provision and its interpretation is particularly relevant for host providers or streaming box distributors, since both could be – depending on the facts – seen as only providing physical facilities. Importantly, the CJEU seems to prefer the narrower interpretation.⁶²

⁵⁸ Article 8 of the WIPO Copyright Treaty, Geneva, December 20, 1996.

⁵⁹ PB Hugenholtz op cit (n56) 798.

⁶⁰ C Angelopoulos ‘On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market’ (2017) 18.

⁶¹ Ibid.

⁶² See *SGAE v Rafael Hoteles* EU (CJEU) C-306/05 at para 47.

2. ‘Making Available’

According to Article 3(1) of the InfoSoc Directive, the right of communication to public includes the right of making available to the public. The specificity of making available compared to communication to the public, however, is that it also covers situations where members of the public have the choice as to the time and the place they want to enjoy the work, i.e. on demand. Whether the act of making available causes the work to be enjoyed is irrelevant. The actual offering suffices.⁶³ Thus, the communication to the public right encompasses two kinds of activities. First, activities such as webcasting or internet radio where the user has to watch at a specific broadcasting time. Second, user-initiated modes of communications such as online streaming services where the user can ‘pull’ the content as his convenience.⁶⁴ Therefore, it is clear that the communication to the public right applies to users who upload content to the above mentioned UGC, file host streaming platforms. On the other hand, it is not quite as clear whether the platforms or streaming box distributors who merely provide the infrastructure and services to upload the videos are making the content available to public.

The InfoSoc Directive does not provide further guidance on what exactly constitutes a communication to the public. Instead, the CJEU has developed several criteria and definitions to clarify the notion of communication to the public in a number of cases. In its decisions the CJEU placed emphasis on recitals 9 and 10 which require Member States to provide for a high level of protection in order to guarantee the availability of an appropriate reward and the opportunity for satisfactory returns on the author’s investment.⁶⁵ Moreover, the CJEU considered the objectives of recitals 3 and 31 which are to maintain a fair balance between, on the one hand, the interests of copyright holders in protecting their intellectual property rights and, on the other, the protection of the interests and fundamental rights of users of protected objects.⁶⁶

⁶³ E Papadaki ‘Hyperlinking, making available and copyright infringement: lessons from European national courts’ (2017) 8 *EJLT* 4; *Società Consortile Fonografici (SCF) v Marco Del Corso* EU (CJEU) C-135/10.

⁶⁴ Angelopoulos op cit (n60) 18.

⁶⁵ *SGAE v Rafael Hoteles* EU (CJEU) C-306/05 at para 34; *GS Media v Sanoma* EU (CJEU) C-160/15 at para 30.

⁶⁶ *GS Media v Sanoma* EU (CJEU) C-160/15 at para 31.

From this it is clear that the interpretation of the communication to the public and making available right is crucial for streaming platforms that offer on-demand or live streaming services as well as for streaming box distributors.

II. Case law of the CJEU

1. *SGAE v Rafael Hoteles*

The first comprehensive case with respect to the communication to the public right was *SGAE v Rafael Hoteles*⁶⁷ ruled on 7 December 2006. In this case the CJEU had to decide whether the installation in individual hotel rooms of TV sets to which a satellite or terrestrial television signal is sent by cable constitute an act of communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. The TV sets enabled the guests to watch programmes on channels whose signals were received by the hotel main aerial and then distributed to each of the TV sets in the room. The CJEU concluded that the hotel organisation intervened, in full knowledge of the consequences of its action, to give access of the protected work to its customers.⁶⁸ It discussed whether the installation was just a ‘mere provision of physical facilities for enabling or making a communication’ in terms of recital 27. The court concluded that companies that sale or hire TV sets could be seen as only providing physical facilities but not the hotel, since it installed and then distributed the signal to its customers.⁶⁹ As mentioned above, this case shows that the CJEU interprets the notion of ‘mere provision of facilities’ literally. This decision was criticised by European copyright scholars as being a ‘logical mistake’. It was argued that the requirement of ‘intervening ... to give access’ was too broad because it would cover any act that provides access to a work, for example, where a bookstore or newsagent lets the public into its premises.⁷⁰ Instead, scholars put forward the concept of ‘transmission’ as the key term for the act of communication.⁷¹ Furthermore, in *SGAE v Rafael Hoteles* the CJEU focused on the notion of ‘public’. The Directive itself does not define the term public. The court referred to previous case law⁷² and defined public as an ‘indeterminate number of potential’ users.⁷³ In addition, the court laid down the requirement of a

⁶⁷ *SGAE v Rafael Hoteles* EU (CJEU) C-306/05

⁶⁸ *SGAE v Rafael Hoteles* EU (CJEU) C-306/05 at para 42.

⁶⁹ *SGAE v Rafael Hoteles* EU (CJEU) C-306/05 at para 46.

⁷⁰ European Copyright Society ‘Opinion on the Reference to the CJEU in case C-466/12 Svensson’ (2013) 6 *University of Cambridge Legal Studies Research Paper Series* 6

⁷¹ European Copyright Society op cit (n70) 3.

⁷² *Mediakabel BV v Commissariaat voor de Media* EU (CJEU) Case C-89/04.

⁷³ *SGAE v Rafael Hoteles* EU (CJEU) C-306/05 at para 37.

‘new’ public, meaning ‘a public different from the public at which the original act of communication of the work is directed’.⁷⁴ It concluded that the hotel guests did amount to a ‘new’ public, since the author of the broadcast only considers direct users, that is, the owners of reception equipment. Whereas the hotel guests receive the broadcast because the hotel owner retransmits them to their TV sets.⁷⁵

2. The ‘new’ public requirement

The CJEU confirmed the requirement of a ‘new’ public in several subsequent cases. It thus became an important requirement and was defined in *Football Association Premier League* as ‘a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public.’⁷⁶ Furthermore, the CJEU sharpened the notion of public in *Del Corso*⁷⁷ and *Phonographic Performance*⁷⁸ by stating that the term refers to an indeterminate number of people, thereby excluding ‘specific individuals belonging to a private group’ and that it must be a ‘fairly large number of people’. From that it can be concluded there is a threshold that has to be met before a group can be considered as being the public. Groups that are too small or insignificant will not qualify as the public. Nevertheless, it should be noted that the CJEU made clear in *SGAE* that the cumulative effect has to be considered when determining the requirement of public. Therefore, it does not only matter how many people have access to the work at the same time but also how many have access to it in succession (for example successive hotel guests).⁷⁹

In addition, in *Football Association Premier League* the CJEU also found that profit-making nature of the respective act is not a necessary precondition but a relevant factor.⁸⁰

⁷⁴ *SGAE v Rafael Hoteles* EU (CJEU) C-306/05 at para 40.

⁷⁵ *SGAE v Rafael Hoteles* EU (CJEU) C-306/05 at para 41.

⁷⁶ *Football Association Premier League v Karen Murphy* EU (CJEU) joined cases C-403/08 and C-429/08 at para 197.

⁷⁷ *Società Consortile Fonografici (SCF) v Marco Del Corso* EU (CJEU) C-135/10 para. 83-87.

⁷⁸ *Phonographic Performance (Ireland) Limited v Ireland and Attorney General* EU (CJEU) C-162/10 at para. 33-35.

⁷⁹ Angelopoulos op cit (n60) 20.

⁸⁰ *Football Association Premier League v Karen Murphy* EU (CJEU) joined cases C-403/08 and C-429/08 at para 204.

In *TVCatchup* the CJEU further refined the requirement of a ‘new’ public. It noted that the public does not have to be a ‘new’ public when the work is communicated ‘under specific technical conditions, using a different means of transmission’.⁸¹ The defendant, TVCatchup, retransmitted television broadcast over the internet through live online streaming. Before using the service, users had to show a valid TV license.⁸² Thus, the recipients of the online streams were persons who had already been taken into account by broadcasting companies. According to CJEU’s ‘new’ public principle, this would have suggested that TVCatchup did not reach a ‘new’ public. However, the court held that in circumstances that the work is communicated under different technological means it is no longer necessary to examine whether the work is communicated to a ‘new’ public.⁸³ With this judgement a dual system of communication to the public was established. Either (1) the work has to be communicated to a ‘new’ public or (2) the work must be communicated by using other technical means from the one’s used by the copyright holder.

3. Linking

The question whether the provision of links may constitute a communication to the public by violating the copyright holder right of making available has been dealt with by the CJEU in a number of recent cases. This issue particularly affects link-sharing and indexing streaming platforms. The first decision in the context of linking was handed down in the *Svensson*⁸⁴ case on 18 September 2012. The applicants were all journalists who wrote articles for the Göteborgs-Posten newspaper which published the articles on its website. The defendant, Retriever Sverige, operates its own website and provided links to articles of other websites. Users of the Sverige website can click on the link and will then be redirected to the website where the original article was published. The journalists brought an action against Retriever Sverige on the ground that the website was infringing their making available right. As a first step the CJEU held that the provision of links on a website to copyright protected content of another website affords users of the first site direct access to those works. Thus, it must be considered as an act of making available and therefore constitutes a communication to

⁸¹ *ITV Broadcasting and others v TVCatchup Ltd* EU (CJEU) Case C-607/11 at para 39.

⁸² *ITV Broadcasting and others v TVCatchup Ltd* EU (CJEU) Case C-607/11 at para 10.

⁸³ *ITV Broadcasting and others v TVCatchup Ltd* EU (CJEU) Case C-607/11 at para 39.

⁸⁴ *Svensson v Retriever Sverige* EU (CJEU) Case C-466/12.

the public.⁸⁵ However, as a second step the court asserted whether the communication reached a ‘new’ public. As in previous rulings the court noted that a ‘new’ public is a public ‘that was not taken into account by the copyright holders when they authorised the initial communication to the public’.⁸⁶ It concluded that the provision of a link to another website which is freely available to all potential internet users does not constitute a communication to a ‘new’ public, since the users must be deemed to be potential recipients of the initial communication (as long as the linked website is freely available to all internet users).⁸⁷

In addition, it held that the use of an embedded link – a link where the linked content appears in such a way as to give the impression that it is appearing on the site on which that link is found – would not change the outcome in any way. The CJEU later confirmed its view on linking in the *Bestwater case*.⁸⁸

One remaining question was whether linking to content that was published without the consent of the copyright owner constitutes a communication to the public. The CJEU had to consider this question in the *GS Media* case⁸⁹. In its analysis the court starts with noting that a fair balance must be maintained between, on the one hand, the interests of the copyright holder and, on the other hand, the interests and fundamental rights of users of protected works.⁹⁰ The court emphasised the importance of the internet to freedom of expression and information and that hyperlinks contribute to the ‘sound operation of the internet as well as to the exchange of opinions and information’.⁹¹ It further observes that it is difficult for individuals to ascertain whether the linked content is copyright protected and whether such content was posted without the consent of the copyright holder. Therefore, as a general rule, it cannot be said that the person ‘intervene[s] in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet’.⁹² As a result, it does not constitute a communication to the public when a person posts a link to content that was uploaded without the consent of the copyright holder, if the person does not

⁸⁵ *Svensson v Retriever Sverige* EU (CJEU) Case C-466/12 at para 23.

⁸⁶ *Svensson v Retriever Sverige* EU (CJEU) Case C-466/12 at para 24.

⁸⁷ *Svensson v Retriever Sverige* EU (CJEU) Case C-466/12 at para 27.

⁸⁸ *Bestwater v Mebes and Potsch* EU (CJEU) C-348/13.

⁸⁹ *GS Media v Sanoma Media and others* EU (CJEU) C-160/15.

⁹⁰ *GS Media v Sanoma Media and others* EU (CJEU) C-160/15 at para 31.

⁹¹ *GS Media v Sanoma Media and others* EU (CJEU) C-160/15 at para 44-45.

⁹² *GS Media v Sanoma Media and others* EU (CJEU) C-160/15 at para 48.

have knowledge thereof. However, the situation is different when such a person knew or ought to have known that the link he posted provides access to copyright protected work which was uploaded without the consent of the copyright holder. Moreover, the court noted that when posting links is carried out for profit, it can be expected that the poster of such links carries out the necessary investigations on the legality of such content. This leads to a rebuttable presumption of knowledge. If such a presumption is not rebutted the act of posting a hyperlink to content which was placed online without the consent of the copyright holder constitutes a ‘communication to the public’ within the meaning of Article 3(1) of the Directive.⁹³

It is worth noting that the CJEU’s approach on hyperlinking has been much criticised by some European copyright law scholars. The ‘European Copyright Society’, for instance, argued that ‘hyperlinking in general should be regarded as an activity that is not covered by the right to communicate the work to the public embodied in Article 3’ of the Directive.⁹⁴ The main argument is that hyperlinks merely provide the viewer with information as to the location of a page that the user can choose to access or not and thus do not communicate a work.⁹⁵

4. *The Filmspeler*⁹⁶ case

In its *Filmspeler* decision of 26 April 2017 the CJEU had to answer the question whether the distribution of a streaming box constitutes a communication to the public within the meaning of Article 3(1) of the InfoSoc Directive. The defendant, Wullems, sold a streaming box under the name ‘Filmspeler’ on various websites. On that streaming box he had installed an open source software, which made it possible to play files through a user-friendly interface via structured menus.⁹⁷ In addition, Wullems installed add-ons that contained hyperlinks to connect to streaming websites operated by third parties, which, *inter alia*, gave access to media content which was uploaded without the consent of the copyright holder.⁹⁸

⁹³ *GS Media v Sanoma Media and others* EU (CJEU) C-160/15 at para 51.

⁹⁴ European Copyright Society ‘Opinion on the Reference to the CJEU in Case C-466/12 Svensson’ (2013) available at <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-46612-svensson/>.

⁹⁵ European Copyright Society op cit (n94) at para 36.

⁹⁶ *Stichting Brein v Jack Frederik Wullems* EU (CJEU) C-527/15.

⁹⁷ *Stichting Brein v Jack Frederik Wullems* EU (CJEU) C-527/15 at para 16.

⁹⁸ *Stichting Brein v Jack Frederik Wullems* EU (CJEU) C-527/15 at para 17.

The primary question in this case was whether the distribution of that player was a communication to the public of the unauthorised copyrighted works streamed through the box. The court began its analysis by referring to previous case law such as the *GS Media* case. According to that case law a communication to the public takes place when the user ‘intervenes, in full knowledge of the consequences of his action, to give access to a protected work to his customers does so, in particular, where, in the absence of that intervention, his customers would not, in principle, be able to enjoy the [...] work’.⁹⁹ The CJEU concluded that Wullems, in full knowledge of his actions, pre-installs the add-ons, which enabled his customers to access the protected works, since otherwise they would have difficulties to find the works on the Internet.¹⁰⁰ Therefore, his actions were to be regarded as an act of communication and should not be confused with the mere provision of physical facilities, referred to in recital 27 of the Directive.¹⁰¹ With regard to the ‘public’ requirement, the court observed that the Filmspeler player had been purchased by a fairly large number of people and that the communication is ‘aimed at an indeterminate number of potential recipients and involves a large number of persons’.¹⁰² In line with its ruling in the *GS Media* case, the CJEU concluded that this communication is also directed to a ‘new’ public, since the works in question were uploaded without the consent of the copyright holders.¹⁰³

5. *The Pirate Bay*¹⁰⁴ case

The CJEU’s most recent case on the communication to the public right concerned the legality of the online file-sharing platform The Pirate Bay (TPB). Even though this judgement concerned a file-sharing platform, a lot can be derived from it for the legal assessment of online streaming platforms. The reference to the CJEU arose in the context of litigation between Stichting Brein, a foundation which safeguards the interests of copyright holders, and Ziggo BV and XS4ALL, two internet access providers. Stichting Brein requested an order requiring the internet access provider to block access for their customers to the website TPB. TPB indexes BitTorrent files relating to protected works and provides a search engine that allows users of that platform to locate those works and to share them in the context of a peer-to-peer

⁹⁹ *Stichting Brein v Jack Frederik Wullems* EU (CJEU) C-527/15 at para 31.

¹⁰⁰ *Stichting Brein v Jack Frederik Wullems* EU (CJEU) C-527/15 at para 41.

¹⁰¹ *Ibid.*

¹⁰² *Stichting Brein v Jack Frederik Wullems* EU (CJEU) C-527/15 at para 45.

¹⁰³ *Stichting Brein v Jack Frederik Wullems* EU (CJEU) C-527/15 at para 47-48.

¹⁰⁴ *Stichting Brein v Ziggo* EU (CJEU) C-610/15.

network by using a BitTorrent client. TPB neither hosts any protected works nor provides the BitTorrent client.¹⁰⁵ Furthermore, the Torrent files are not uploaded by the operators of the TPB platform but by its users.¹⁰⁶ The question before the CJEU was whether TPB's activities constitutes a communication to the public. The court approached the issue by stating that several complementary criteria have to be taken into account when assessing whether a communication to the public has taken place. One of those criteria is the 'indispensable role played by the user and the deliberate nature of his intervention'.¹⁰⁷ An act of communication is given when the user 'intervenes, in full knowledge of the consequences of his action, to give his customers access to a protected work'.¹⁰⁸ Applying these rules to the facts of the case, the court concluded that there is no dispute that copyright protected works are made available, by means of the TPB platform, to the public. Thus, an act of communication to the public has taken place.¹⁰⁹ The question was however whether the operators of the platform were responsible for this making available, since they did not upload the works but merely provided the platform. Nevertheless, the court concluded that the operators of TPB, 'by making that platform available and managing it, provide their users with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available.'¹¹⁰

Moreover, the court discussed whether TPB could rely on only making a 'mere provision' of physical facilities for enabling or making a communication, within the meaning of recital 27 of the Directive. In that regard, the CJEU mentioned that TPB 'indexes torrent files in such a way that the works to which the torrent files refer may be easily located and downloaded by the users of that sharing platform'.¹¹¹ It classifies them under different categories and ensures that a work has been placed in the right category. Furthermore, it deletes faulty or obsolete files. As a result, the court held that the operators are not merely providing physical facilities.¹¹²

¹⁰⁵ *Stichting Brein v Ziggo* EU (CJEU) C-610/15 at paras 9-11.

¹⁰⁶ *Stichting Brein v Ziggo* EU (CJEU) C-610/15 at para 36.

¹⁰⁷ *Stichting Brein v Ziggo* EU (CJEU) C-610/15 at paras 25-26.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Stichting Brein v Ziggo* EU (CJEU) C-610/15 at para 35.

¹¹⁰ *Stichting Brein v Ziggo* EU (CJEU) C-610/15 at para 37.

¹¹¹ *Stichting Brein v Ziggo* EU (CJEU) C-610/15 at para 38.

¹¹² *Ibid.*

With regard to the knowledge requirement, the CJEU stated that the operators of TPB were informed that they provide access to works that have been published without the authorisation of the copyright holder. Therefore, they could not be unaware that they make infringing works available to the public.¹¹³

Since a large number of subscribers of the internet access providers downloaded content using the TPB platform, the communication is aimed at an indeterminate number of potential recipients and involves a large number of persons. Thus, it is directed to a public.¹¹⁴ Lastly, the court noted that the TPB platform is generating considerable advertising revenues. This profit-making nature also contributes to the finding that TPB's acts fall under 'communicating to the public' within the meaning of Article 3(1) of the Directive.

6. Conclusion for streaming platforms and streaming box distributors

To date, no indication on whether UGC platforms or file hosts communicate works uploaded by their users to the public has been given at EU level. The requirement of a 'new public' will most likely be met. Anyone with an Internet connection has access to videos uploaded on UGC and file host platforms. This constitutes a public that has not been taken into account by the copyright holders when they authorised the initial communication to the public. The question remains whether this constitutes a communication by the UGC and file host streaming platforms. As the CJEU pointed out in its decisions relating to Article 3 of the InfoSoc Directive, the alleged infringer must have 'intervened, in full knowledge of the consequences of his action, to give access to the protected work to others'.¹¹⁵ The indispensable role and the deliberate nature of his intervention are relevant. Thus, the crucial aspect will be the knowledge requirement. For instance, in the *Pirate Bay* case the CJEU stressed that the operators have been informed that their platform provides access to copyright-protected works and that they expressly displayed, on that platform, their intention of making protected works available to users.¹¹⁶ Mainstream UGC streaming platforms, such as YouTube and Dailymotion, do not advertise with making protected works available or encourage their users to upload protected works. On the contrary, these sites usually incorporate provisions in their terms and use that prohibit to upload any third party copyright

¹¹³ *Stichting Brein v Ziggo* EU (CJEU) C-610/15 at para 45.

¹¹⁴ *Stichting Brein v Ziggo* EU (CJEU) C-610/15 at para 42.

¹¹⁵ For example *SGAE v Rafael Hoteles* EU (CJEU) C-306/05 at para 42.

¹¹⁶ *Stichting Brein v Ziggo* EU (CJEU) C-610/15 at para 45.

material.¹¹⁷ Additionally, these sites as well as file hosts have implemented automatic filters that search for copyright protected content.¹¹⁸ Therefore, mainstream providers who do not promote infringing use, do not have actual knowledge of the infringing content and who respond to takedown-notices are most likely not communicating works to the public within the meaning of Article 3 of the InfoSoc Directive.

With regards to sites that share or index links to unauthorised streaming content, the *GS Media* case provides guidance. The CJEU pointed out that a link to content that was uploaded without the consent of the copyright holder only constitutes a communication to the public when the poster of that link knew or ought to know of the infringing content. Furthermore, when posting links is carried out for profit, it can be expected that the poster of such links carries out the necessary investigations on the legality of such content. A lot of websites share or index links mainly to copyright protected works. They categorise links in categories such as “current feature films” or “series” and provide editorial oversight over the posted links.¹¹⁹ Since these sites will usually have knowledge of the fact that the links provide access to protected work that was uploaded without the consent of the copyright holders, they will most likely infringe the right of communication to the public within the meaning of Article 3 of the InfoSoc Directive. Therefore, whether a link-sharing or indexing website will be held liable for communicating works to the public depends on the structure and operation of the site.

With regard to the liability of streaming box distributors, the CJEU pointed out that the deliberate act of installing add-ons on the streaming box, which contained hyperlinks to copyright protected works, was the crucial aspect. Furthermore, the court emphasised that the distributor also advertised these add-ons, so that the main attraction of such a player is to enable users to gain access to sites on which copyright-protected films are made available without the consent of the copyright holders. It follows from that that the distribution of streaming boxes as such does not constitute a communication to the public. An act of communication requires an intervention, e.g. in form of installing add-ons. The mere distribution of a streaming box without pre-

¹¹⁷ For example, YouTube ‘Terms of Service’ at para 7.7; available at <https://www.youtube.com/static?template=terms>.

¹¹⁸ For example, YouTube’s Content ID.

¹¹⁹ See for example, 123movies.com.

installing add-ons should constitute a ‘mere provision of physical facilities for enabling or making a communication’ in terms of recital 27 of the InfoSoc Directive, which does not in itself amount to communication within the meaning of Article 3.

7. Primary and secondary liability

Besides laying down the requirements of the right of communication in more concrete terms, the recent case law of the CJEU, especially the *Pirate Bay* and *Filmspeler* case, had impact on the interplay between primary and secondary liability for copyright infringement. The EU has harmonized the conditions for primary liability in its InfoSoc Directive. The conditions of secondary liability are, however, not harmonised and left to the legal systems of the Member States. It has been argued that the *Pirate Bay* case as well as the *Filmspeler* case are actually cases of secondary infringement because the services of the TPB platform and Filmspeler are used by others to infringe copyright.¹²⁰ Both, the TPB platform as well as the distributor of the Filmspeler rather contribute, induce or facilitate the copyright infringement of the primary wrongdoer. By regarding such contributory actions as communication to the public and by introducing the knowledge requirement within the scope of Article 3 of the Directive, the CJEU blurs the line between primary liability and secondary liability because knowledge was never a traditional condition for direct copyright infringement. Instead, actual knowledge or constructive knowledge was always a requirement for secondary liability.¹²¹ This decision could have an effect and could be applicable to different types of online platforms and intermediaries, including online streaming platforms.

Why did the CJEU (over-) expand the notion of Article 3 of the InfoSoc Directive and considered the acts of TPB as direct infringement? The reason is most likely the absence of any real harmonisation of secondary liability on the European level. By applying and expanding the rules of primary infringement to cases where a person is merely facilitating, inducing or contributing to the direct infringement of another person the court tried to harmonise indirect liability on the European level.¹²² Since Internet intermediaries act across the European borders, it makes sense to have a harmonised indirect copyright liability regime. The case law of the CJEU in terms of

¹²⁰ C Angelopoulos ‘CJEU Decision on Ziggo: The Pirate Bay Communicates Work To The Public’ (2017), available at <http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/>.

¹²¹ Ibid.

¹²² Ibid.

the right of communication to the public together with the safe harbour regimes of the E-commerce Directive leads to some harmonisation of secondary liability. The case law on the communication to the public right says when liability can be imposed on ‘indirect’ infringers and the safe harbour regime says when this is not the case.¹²³ Nevertheless, this judge-made harmonisation could lead to legal uncertainties in European countries that already have a secondary liability regime, notably liability by authorisation in the UK or the German ‘Störerhaftung’.¹²⁴ In fact, the TPB platform was blocked in most Member States under regimes of secondary or accessory liability.¹²⁵ In the future, national courts have to assess situations like *The Pirate Bay* or *Filmspeler* through the lens of primary infringement – instead of indirect infringement. This might cause damage to the balance between primary and secondary liability in the national legislations.¹²⁶ In addition, gaps will remain, since a safe harbour regime and CJEU’s interpretation of Article 3 of the Directive is not the same as a substantive secondary liability regime. For instance, the E-commerce Directive does not provide for a safe harbour for hyperlinking or peer-to-peer indexing sites. In cases that the knowledge requirement is not fulfilled, the national courts and legislation will have to deal with the question of secondary liability. Therefore, the decisions of the CJEU do not lead to a fully harmonised secondary liability regime.

III. Select National Approaches

As the CJEU emphasised, Member States are bound to the notion of communication to the public as it is set out by the CJEU. They may not provide for a concept of communication to the public that is wider than the one at EU level.¹²⁷ As shown above, the right has become increasingly complex over the years, which leads to legal uncertainty in the Member States. So far, there has not been a case before the CJEU concerning the question whether streaming platforms are communicating works to the public. Therefore, it is worth having a look at how national case law interprets the right of communication to the public. Besides the question of direct liability

¹²³ Ibid.

¹²⁴ E Rosati ‘Why a reform of hosting providers’ safe harbour is unnecessary under EU copyright law’ (2016) *CREATe Working Paper Series* 11.

¹²⁵ See *Internationella åklagarkammaren i Stockholm vs Hans Fredrik Lennart Neij* Sweden B 13301-06; *Dramatico and others v British Sky Broadcasting and others* UK (Ch) EWHC 268.

¹²⁶ Ibid.

¹²⁷ *Svensson v Retriever Sverige* EU (CJEU) C-466/12 at para 42.

(communication to the public), this subsection will analyse how the UK and Germany deal with cases of secondary liability.

1. Germany

In Germany the Court of Appeal of Hamburg had to decide, in 2015, whether YouTube was directly liable for copyright infringing content that was posted by its users.¹²⁸ With regard to the question whether YouTube was making available works to the public, the court held that the act of making available was conducted by its users and not by YouTube itself.¹²⁹ Furthermore, the court assessed whether YouTube had adopted the content and was therefore directly infringing copyright. The idea behind that was that hosting providers who appropriate third party content can be made liable for the appropriated content as for its own content. The notion of adoption was developed in the *marions-kochbuch.de* decision¹³⁰ by the German Federal Court of Justice (Bundesgerichtshof (BGH)). In *marions-kochbuch.de* the key criteria were whether the host provider reviews the content, requires the user to grant comprehensive rights of exploitation, affixes its logo on the third party content and whether the content constitutes the core value of the website.¹³¹ In the *YouTube* case the Court of Appeal of Hamburg acknowledged that YouTube provides assistance for its users who view and upload the videos, such as the structuring of content in several categories but found that these acts were not sufficient for the finding of adoption.¹³² Under normal circumstances, a UGC host provider is not liable for the content of its users, if it is handled in an automated process and a disclaimer prevents the impression that the owner of the platform wants to appropriate the content.¹³³

In Germany, secondary liability is mainly dealt with through the principle of breach of duty of care – sometimes also called ‘interferer’ liability (‘Störerhaftung’).¹³⁴ The principle of breach of duty of care is only aimed at injunctive orders against intermediaries but not claims for damages.¹³⁵ For a breach of duty of care to occur

¹²⁸ *Youtube Germany* (OLG Hamburg) 5 U 87/12.

¹²⁹ *Youtube Germany* (OLG Hamburg) 5 U 87/12 at para 172.

¹³⁰ *marions-kochbuch.de Germany* (BGH) I ZR 166/07.

¹³¹ *marions-kochbuch.de Germany* (BGH) I ZR 166/07 at paras 26-30.

¹³² *Youtube Germany* (OLG Hamburg) 5 U 87/12 at para 195.

¹³³ *Jugendgefährdende Medien bei eBay Germany* (BGH) I ZR 18/04 at para 17.

¹³⁴ Nordemann op cit (n26) 39.

¹³⁵ *Internetversteigerung I Germany* (BGH) I ZR 304/01 at para 46.

three requirements have to be met: (1) the secondary infringer has to have adequately contributed to that infringement, (2) the secondary infringer must have the legal possibility of preventing the principal infringement and (3) the secondary infringer must have violated a duty of care.¹³⁶ A violation of such a duty of care requires an assessment whether the fulfilment of the duty of care was reasonable.¹³⁷ It is unreasonable, if it would unduly impair the business of the ‘interferer’ or if the copyright infringement is not recognisable to the ‘interferer’.¹³⁸ With regard to the duty to monitor the content that is posted onto the hosting provider’s platform the German Federal Court of Justice held that auction platforms like eBay do not have to monitor each and every article that is listed on their platform, because such an obligation would undermine the whole business model.¹³⁹ A duty of care arises as soon as hosting providers are aware of copyright infringing content on their platforms. This knowledge is typically gained by a notice-and-takedown letter sent by the rights holder. After receiving such a letter the hosting provider must take the necessary measures to stop the infringement and has a duty of care to prevent the same type of infringement that are easily recognisable in the future.¹⁴⁰

In this context the BGH found that the file-host Rapidshare had to perform automatic as well as manual searches for future infringements after having received a takedown-notice.¹⁴¹ In another case involving Rapidshare, the BGH held that Rapidshare has to monitor its content extensively and regularly for copyright infringing content, for instance, through automatic filters as well as employees who examine the content manually. The main reasons for this heightened and extensive obligation to monitor and actively search for infringing content was the fact that Rapidshare promoted the infringing use of its services by giving incentives to users who uploaded popular files.¹⁴²

In line with these decisions, the Court of Appeal of Hamburg held in the *YouTube* case that YouTube had to use an automatic filtering mechanism to prevent any future

¹³⁶ JB Nordemann *Fromm/Nordemann, Urheberrecht [German Copyright Law]* 11ed (2014) Sec. 97 para 156.

¹³⁷ Nordemann op cit (n26) 40.

¹³⁸ Ibid; T Hoeren, V Bensinger *Haftung im Internet – Die Neue Rechtslage* (2014) 366.

¹³⁹ *Internetversteigerung I* Germany (BGH) I ZR 304/01 at para 45.

¹⁴⁰ Nordemann op cit (n26) 40; J Bornkamm ‘E-Commerce Directive vs. IP Rights Enforcement – Legal Balance Achieved?’ (2007) *GRUR Int* 642.

¹⁴¹ *Rapidshare – Alone in the Dark*, Germany (BGH) I ZR 18/11.

¹⁴² *Rapidshare – Alone in the Dark*, Germany (BGH) I ZR 18/11 at para 49.

infringement of content that had already been claimed through a takedown-notice. Therefore, YouTube was ordered to use its Content ID software itself, instead of leaving it to the right holders to use the software to detect copyright violation.¹⁴³ Since Content ID is only capable of blocking identical files, YouTube was also ordered to implement a word filter, which checks the title and description of the uploaded files.¹⁴⁴

Besides the principle of breach of duty of care, German law also provides for other forms of secondary liability on the bases of general principles of tort law. Under §830 of the German Civil Code (‘Bürgerliches Gesetzbuch – BGB’) participants to an infringement face the same liability as the direct infringer, i.e. they can also be held liable for damages. A participant is either an instigator or abetter. An instigator is anyone who incites unlawful acts of the direct infringer. An abetter is deliberately assisting to the direct infringement.¹⁴⁵ However, liability as a participant requires contingent intent of the participant. Contingent intent requires that the participant seriously considered the risk of infringement and approvingly accepted it. This implies that the participant has to be positively aware of the act resulting in primary infringement, and of the person committing it.¹⁴⁶ This requirement is not usually met by host providers. Therefore, host providers are rarely convicted for participatory/contributory liability in Germany.¹⁴⁷ Another form of secondary liability is infringement by forbearance.¹⁴⁸ This form of liability arises when the host provider consistently violates his duties of care.¹⁴⁹ Such a liability has been accepted in a case where the host provider did not take any measures to stop the infringing activity even though it had received a takedown-notice.¹⁵⁰

German case law shows that UGC hosts such as YouTube or Dailymotion as well as file hosts such as nowvideo.sx or openload.co will most likely not be held liable for direct copyright infringement before a German court. Also, there will usually not be secondary infringement in the sense of instigation or abetting due to lack of contingent

¹⁴³ *Youtube Germany* (OLG Hamburg) 5 U 87/12 at para 446.

¹⁴⁴ *Youtube Germany* (OLG Hamburg) 5 U 87/12 at para 446.

¹⁴⁵ J Becher *Copyright and User-Generated Content: Legal Challenges for Community-Based Businesses in Germany and the USA* LLM (Bucerius Law School Hamburg) (2010) 29.

¹⁴⁶ *Ibid*; *Internetversteigerung I* Germany (BGH) I ZR 304/01 at para 43.

¹⁴⁷ GB Dinwoodie *Secondary Liability of Internet Service Providers* 25ed (2017) 364.

¹⁴⁸ Angelopoulos op cit (n60) 30.

¹⁴⁹ Nordemann op cit (n26) 39.

¹⁵⁰ *eBay Germany* (LG München) 21 O 2793/05 at I.1.1)d)aa).

intent. Such hosts will more likely face secondary liability on the basis of the principle of breach of duty of care. As stated above, this liability can substantiate orders for removal of the disturbance or injunctions concerning future conduct or orders to use automated filtering mechanisms as well as manual control mechanisms.

Link-sharing and indexing streaming platforms are also most likely to be held liable in terms of breach of duty of care. Even without a notice-and-takedown letter, a duty of care can arise for link-sharing and indexing hosts, in particular if they increase the susceptibility of their services by, for example, advertising the rights-infringing use of their services. Link-sharing or indexing platforms often set up categories like ‘cinema films’ or ‘current series’ (e.g. 123movies.com) and thus, at least indirectly, promote the infringing use of their services¹⁵¹. In this case, duties of care would arise even in the absence of a takedown-notice. Furthermore, streaming platforms that promote the use of illegally hosted content or use categories susceptible to infringements are also likely to be held liable for participatory infringement, since contingent intent will be easier to substantiate in these cases. In addition, these platforms are often consistently violating their duties of care and can thus be held liable for infringement by forbearance.

With regard to streaming box distributors currently no case law exists in Germany. However, considering the more defensive approach of German courts when it comes to primary liability, it is likely that they would have found streaming box distributors liable under the principle of breach of duty of care and not for primary copyright infringement. However, since the decision of the CJEU in the *Filmspeler* case is binding for the courts of Member States, German courts will have to assess the liability of streaming box distributors through the lens of primary infringement.¹⁵²

2. United Kingdom

In contrast to German case law, courts in the UK follow a more expansive approach when it comes to direct liability of hosting providers in form of communicating works to the public. Furthermore, courts focus on the legal tools of secondary liability in the form of authorisation and joint tortfeasance.¹⁵³

¹⁵¹ Nordemann op cit (n26) 43; T Wilmer ‘Überspannte Prüfpflichten für Host-Provider? – Vorschlag für eine Haftungsmatrix’ 26 (2008) *NJW* 1949.

¹⁵² G Mikelson ‘The Binding Force of the Case Law of the European Court of Justice of the European Union’ 20 (2013) *Jurisprudencia* 470-474.

¹⁵³ Angelopoulos op cit (n60) 23.

Primary infringement of a host provider has been found in the *Newzbin (No.1)* case¹⁵⁴. Newzbin was a Usenet indexing site, which facilitated access to content on Usenet. It indexed binary files and offered the results through a search engine, which located and categorised the files in categories such as ‘Movies’ or ‘Music’. In addition, it allowed the files to be downloaded with a suitable newsreader.¹⁵⁵ The High court held that the operators of the site were liable for communicating the infringing works to the public under s 20(2)(b) of the Copyright Designs and Patents Act (CDPA) 1988, authorising acts of infringement by its users and being a joint tortfeasor in those infringements.¹⁵⁶ With regard to the question whether Newzbin had communicated works to the public the court referred to CJEU’s judgement in the *SGAE* case¹⁵⁷. It pointed out that the service of Newzbin is ‘not remotely passive. Nor does it simply provide a link to a film of interest which is made available by a third party.’¹⁵⁸ The court emphasised that the service was offered upon payment to premium members of a weekly subscription free and in full knowledge of the consequences of its actions.¹⁵⁹ This reasoning is in line with the decision in *SGAE* and the more recent decisions of the CJEU in terms of Article 3 of the InfoSoc Directive.

In terms of authorisation, section 16 of the CDPA states that copyright is infringed by a person who, *inter alia*, authorises another person to do any act restricted by that copyright without the licence of the copyright owner. The High Court defines ‘authorisation’ as ‘the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement.’¹⁶⁰ In this regard, several aspects were considered. It was emphasised that Newzbin provides the means for infringement and controls them. Moreover, Newzbin had not installed a filtering system to prevent infringement actively encouraged its editors to make reports on movies and rewarded such activity.¹⁶¹

In considering whether Newzbin was liable as a joint tortfeasor, it was held that mere assistance or facilitation of the primary infringement is not enough. The joint tortfeasor

¹⁵⁴ *Twentieth Century Fox Film Corporation v Newzbin* UK EWHC 608 (Ch).

¹⁵⁵ *Twentieth Century Fox Film Corporation v Newzbin* UK EWHC 608 (Ch) at paras 2-13.

¹⁵⁶ *Twentieth Century Fox Film Corporation v Newzbin* UK EWHC 608 (Ch) at para 126.

¹⁵⁷ See Chapter 3 II. 1.

¹⁵⁸ *Twentieth Century Fox Film Corporation v Newzbin* UK EWHC 608 (Ch) at para 125.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Twentieth Century Fox Film Corporation v Newzbin* UK EWHC 608 (Ch) at para 90.

¹⁶¹ *Twentieth Century Fox Film Corporation v Newzbin* UK EWHC 608 (Ch) at paras 98 – 102.

must involve himself in the copyright infringement as to make it his own.¹⁶² The court found that the structure of the site was promoting infringement by making it easy for users to find and download specific movies and music at the click of a button. Thus, it was held that Newzbin procured and engaged in a common design with its users to infringe copyright.¹⁶³

In contrast to the *Newzbin* case, subsequent case law in the UK only dealt with the liability of host providers incidentally, as a requirement for issuing blocking orders against access providers. Section 97A(1) of the CDPA permits injunctions against service providers where such had actual knowledge of a third party using its services to infringe copyright. Section 97A of the CDPA implements Article 8(3) of the Infosoc Directive.¹⁶⁴ Section 97A of the Act gives right holders the possibility of applying for an injunction against access providers to block access of their customers to target sites that infringe copyright. Four requirements have to be met: (1) the respondents are service providers; (2) the users and/or the operators of the target websites infringe copyright; (3) the users and/or the operators of the target websites use the services of the Respondents to do that; and (4) the respondents have actual knowledge of this.¹⁶⁵

While the High Court found Newzbin liable for direct infringement, it did not even address primary infringement in a case against ‘The Pirate Bay’.¹⁶⁶ In contrast to the ruling of the CJEU, it concluded that only the users of the site were infringing the copyright owners’ reproduction right and the right of communication to the public. TBP was only held as a joint tortfeasor and for authorisation. However, in a series of cases involving streaming sites, UK courts held these sites liable for communicating works to the public.¹⁶⁷

For instance, in *FAPL v Sky* the live sports streaming site FirstRow1.eu was held liable for communicating works to the public. The court argued that the website employed moderators who vet and index the submissions made by third party streamers.

¹⁶² *Twentieth Century Fox Film Corporation v Newzbin* UK EWHC 608 (Ch) at paras 108.

¹⁶³ *Twentieth Century Fox Film Corporation v Newzbin* UK EWHC 608 (Ch) at paras 112.

¹⁶⁴ MA Kupperts *Third-Party Copyright Liability of Online Service Providers in the United Kingdom & United States of America* D.Phil (London) (2011) 128.

¹⁶⁵ *Paramount v Sky 2* UK EWHC 937 (Ch) at para 12.

¹⁶⁶ *Dramatico and others v British Sky Broadcasting and others* UK 268 EWHC (Ch).

¹⁶⁷ *FAPL v Sky* UK EWHC 2058 (Ch); *Paramount v Sky 1* UK EWHC 3479 (Ch); *Paramount v Sky 2* UK EWHC 937 (Ch).

Furthermore, the website gave the impression that it was open to submissions of links by any member of the public but instead sourced links to streams from a number of existing trusting streamers.¹⁶⁸ Therefore, the court held that FirstRow's level of involvement meant that FirstRow itself was communicating works to the public.

In *Paramount v Sky 1* the England High Court had to decide whether the link-sharing streaming platforms 'SolarMovie' and 'TubePlus' could be held liable for copyright infringement. Similar to FirstRow, the court observed that the sites make sure that the links to the streams are comprehensively categorised, referenced, moderated and searchable. Furthermore, the site operators controlled the quality of the submitted links.¹⁶⁹ Therefore, the court concluded that the combined effects of the acts do amount to communication to the public.¹⁷⁰

It should be noted that all of these cases only examined whether blocking orders against access providers could be issued, thus they only addressed the liability of the streaming hosts indirectly. Furthermore, the High Court left it somewhat open whether the streaming sites infringed the right of communication to the public and relied on secondary liability which was definitely established ('[...] even if that is wrong and the operators do not themselves carry out the act of communication to the public, [...]')¹⁷¹.

From the above the following conclusions can be reached for streaming platforms and streaming box distributors. With regard to link-sharing platforms, UK case law shows that the degree of involvement of the platform plays a crucial role when determining whether they communicate works to the public themselves. If they provide editorial oversight over the submitted links such as categorising, referencing or moderating the submission, they will most likely be held liable for primary infringement. In any case, streaming platforms which submit the links themselves are content providers and are thus liable as primary infringers.¹⁷² The degree of editorial oversight determines the liability for authorisation or joint tortfeasance in the same way.

¹⁶⁸ *FAPL v Sky* UK EWHC 2058 (Ch) at para 16.

¹⁶⁹ *Paramount v Sky 1* UK EWHC 3479 (Ch) at paras 5-7.

¹⁷⁰ *Paramount v Sky 1* UK EWHC 3479 (Ch) at para 37.

¹⁷¹ *Paramount v Sky 2* UK EWHC 937 (Ch) at para 22.

¹⁷² See *Paramount v Sky 2* UK EWHC 937 (Ch) at para 5.

With regard to file hosts streaming platforms who merely provide Internet storage and a video player, no case law exists in the UK. Considering the more passive role of such hosts and the possibility of non-infringing use, it does not seem likely, however, that a UK court would hold them liable for damages as a primary or secondary infringer but rather order injunctions under section 97A of the Act. Also with regards to the copyright liability of UGC platforms, to date, no UK case law exists. It is not clear in how far mainstream streaming platforms such as YouTube or Dailymotion would be held liable for copyright infringements of their users. However, it is worth noting that eBay was neither held liable as a primary infringer nor as a secondary infringer for trademark infringements of its users.¹⁷³ This indicates at least the tendency not to hold mainstream host providers liable.

No court in the UK has dealt with the liability of streaming box distributors. As mentioned above, the CJEU's ruling in the *Filmspeler* case is binding. Thus, UK courts would have to consider primary liability. Furthermore, UK courts would most likely find a streaming box distributor, such as the distributor of the *Filmspeler*, liable for authorisation and joint tortfeasance.

IV. The hosting safe harbour of the E-Commerce Directive

Section 4 (articles 12 to 15) of the E-Commerce Directive introduced a special intermediary liability framework. It provides for a cluster of conditional exemptions from liability for internet intermediaries. These limitations of liability apply to internet intermediaries providing services consisting of mere conduit, caching and hosting. They are established in a horizontal manner, meaning that they cover liability for all types of illegal activities, including copyright infringement. However, they only apply as regards to damages and do not affect the possibility of a national court or administrative authority to require a service provider to terminate or prevent an infringement.¹⁷⁴ The limitations were introduced to ensure the provision of basic services which safeguard the continued free flow of information in the network and to ensure the development of the internet and e-commerce in the EU.¹⁷⁵

For the purposes of this thesis the hosting safe harbour, which is implemented in Article 14 of the E-Commerce Directive, is most relevant and will thus be analysed

¹⁷³ *L'Oréal v EBay International* UK EWHC 1094 (Ch) at paras 365-382.

¹⁷⁴ Articles 12(3), 13(2), 14(3) of the E-Commerce Directive.

¹⁷⁵ First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council, COM (2003) 702 final, 13.

below. Article 14 protects providers of an information society service ‘that consists of the storage of information provided by a recipient on the service’.

1. Requirements for safe harbour under article 14 of the E-Commerce Directive

To benefit from the safe harbour provision, one must first qualify as a provider of ‘information society services’. Information society services are defined as ‘any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.’¹⁷⁶ “At a distance” means that the service is provided without the parties being simultaneously present’.¹⁷⁷ “At the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.’¹⁷⁸ With regard to the requirement that the service is ‘normally provided for remuneration’ recital 18 of the E-Commerce Directive states that the safe harbour regime also covers services ‘which are not remunerated by those who receive them’, ‘in so far as they represent an economic activity’. This means that also providers, which offer their services for free and generate revenue through advertising, can qualify as information service providers.¹⁷⁹ Therefore, UGC, link-sharing and indexing streaming platforms, which mostly gain revenue from advertising, are not screened out from the concept of information society providers.

In order to enjoy safe harbour protection, host providers in terms of Article 14 must (1) ‘not have actual knowledge of illegal activity or information and, as regards claims for damages, not [be] aware of facts or circumstances from which the illegal activity or information is apparent; or’ (2) ‘upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.’¹⁸⁰ With regard to the knowledge requirement, Article 15 of the E-Commerce has to be considered, which prohibits Member States from imposing a general obligation on providers ‘to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.’ Thus, the most common way for a host provider to obtain actual knowledge or awareness will be a notice of the right holders. The hosting safe harbour, therefore, relies heavily on the concept of notice-

¹⁷⁶ Definition in article 1(2) of Directive 98/34/EC (as amended by Directive 98/48/EC), as referred to by article 2(a) of the eCommerce Directive.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ See *Papasavvas v O Fileleftheros Dimosia Etairia* EU (CJEU) C-291/13.

¹⁸⁰ Article 14 of the E-Commerce Directive

and-takedown, however, without providing for rules that regulate the notice-and-takedown procedure in detail.¹⁸¹

2. The safe harbour effect on streaming host providers and streaming box distributors

a. UGC and file host streaming platforms

UGC streaming platforms like YouTube or Dailymotion qualify as information service providers, because they provide services for remuneration, at a distance by electronic means and at the individual request of a recipient of services. As shown above, the fact that they usually provide their service at no charge does not mean that it is not a service provided for remuneration. It is sufficient that they make economic gains through their activity, in particular, through advertising.¹⁸² Furthermore, UGC hosts provide on-demand streaming and therefore provide their services at the individual request of their recipients.¹⁸³

The first criteria that explicitly regards hosting, is that the provider provides services that ‘consist of the storage of information provided by a recipient of the service’. The CJEU defined storage as simply meaning to hold ‘in memory on its server, certain data.’¹⁸⁴ UGC streaming platforms should generally meet this requirement, since their business consists of the storage of media content uploaded by its users. The more interactive role of such UGC platforms does not affect this. The CJEU affirmed that in its *Netlog* decision¹⁸⁵, where it held that a social networking platform was a host provider in the sense of Article 14 of the E-Commerce Directive.

The question that remains is whether UGC platforms meet the so called ‘neutrality test’. This test was developed by the CJEU in its *Google France* judgement. It explained that the immunity of Article 14 does not apply to all service providers but is limited to service providers that are ‘intermediary service providers’ as stated in the

¹⁸¹ Angelopoulos op cit (n60) 9.

¹⁸² Ibid.

¹⁸³ See Recital 18 of the E-Commerce Directive.

¹⁸⁴ *Google France v Louis Vuitton et al* EU (CJEU) joined cases C-236/08 and C-237/08.

¹⁸⁵ *SABAM v Netlog* EU (CJEU) C-360/10.

title of section 4 (Articles 12-15).¹⁸⁶ In order to qualify as an ‘intermediary service provider’ the activity (e.g. storage) of the information society service provider has to be ‘of a mere technical, automatic and passive nature, which implies that the service provider has neither knowledge of nor control over the information which is transmitted or stored’¹⁸⁷.

Does that mean that UGC platforms such as YouTube or Dailymotion lose safe harbour protection, since they make available tools for uploading content, categorise and display it? The answer is most likely no. In *L’Oréal*, a case involving trademark infringements, the CJEU stated that ‘the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability’¹⁸⁸. This indicates that Article 14 does not require complete passivity from a host provider. It can be assumed that UGC platforms are considered to be neutral as long as they do not contribute to the creation of the relevant content or provide assistance geared at optimising the presentation of or promoting that content.¹⁸⁹ This also seems to be the approach taken by the national courts of the Member States.¹⁹⁰ Thus, whether a UGC streaming platform enjoys safe harbour protection depends on the specific facts relating to the structure and operation of the site. However, one can say that, under normal circumstances, the mainstream UGC streaming hosts should be shielded by Article 14 of the E-Commerce Directive, as they usually merely provide abstract advice or an automatic technical process to organise the content. In such cases the host providers do not have knowledge nor are they aware of facts or circumstances from which the illegal activity or information is apparent. The same will apply to file hosts who merely provide internet storage and a streaming player. Their role is even more passive than the one of UGC platforms, as they do not provide for a search function or categorisation. As long as they comply with takedown-notices, they arguably enjoy protection in terms of Article 14 of the E-Commerce Directive.

¹⁸⁶ *Google France v Louis Vuitton et al EU* (CJEU) joined cases C-236/08 and C-237/08 at para 112.

¹⁸⁷ *Google France v Louis Vuitton et al EU* (CJEU) joined cases C-236/08 and C-237/08 at para 112.

¹⁸⁸ *L’Oréal v eBay International EU* (CJEU) C-324/09 at paras 115-116.

¹⁸⁹ Angelopoulos op cit (n60) 9

¹⁹⁰ See, for example, *GEMA v YouTube Germany* (OLG Hamburg) 5 U 87/12 at paras 270-301; *TF1 and others v Dailymotion France* (Cour d’appel de Paris)

b. Link-sharing and link-indexing streaming platforms

Link-sharing and indexing hosts could qualify for safe harbour protection, depending on the structure of the site and the specific facts of the case. If they are structured as providing a platform where users can submit links to streaming content, they provide services that ‘consist of the storage of information provided by a recipient of the service’, thus, are host providers within the meaning of Article 14 of the E-Commerce Directive. Depending on whether their services are of a mere technical, automatic and passive nature, they can benefit from the safe harbour. However, many link-sharing and indexing streaming platforms, such as 123movies.com or alluc.ee, focus exclusively on linking to copyrighted material. These sites most likely cannot claim that they did not know that they were linking to infringing material. Therefore, they will have actual knowledge of illegal activity or at least be aware of facts or circumstances from which the illegal activity or information is apparent. Thus, they do not fulfil the safe harbour requirements of Article 14 of the E-Commerce Directive. Moreover, if such a site were to truly comply with takedown notices, almost all of its content would have to be taken down. There would not be any reason to keep the site running.¹⁹¹

c. Streaming box distributors

Recital 18 of the E-Commerce Directive makes clear that information society services cover a wide range of economic activities which take place online. However, activities such as the delivery of goods as such or the provision of services offline are not covered.¹⁹² Therefore, the distribution of a streaming box does not constitute an information society service. The E-Commerce safe harbours do thus not apply. In addition, that service does not ‘consist of the storage of information provided by a recipient of the service’, so that Article 14 of the E-Commerce Directive cannot apply.

¹⁹¹ JJ Lunardi ‘Guerrilla Video: Potential Copyright Liability for Websites That Index Links to Unauthorized Streaming Content’ (2009) 19 *IPLJ* 1125

¹⁹² Recital 18 of the E-Commerce Directive.

CHAPTER 4. COMPARISON TO THE LIABILITY OF STREAMING PLATFORMS AND STREAMING BOX DISTRIBUTORS IN THE U.S.

The U.S. copyright law is contained in chapters 1 through 8 and 10 through 12 of title 17 of the United States Code. It recognises both primary liability and secondary liability for copyright infringement. It grants the copyright owner the following exclusive rights: (1) to reproduce the copyrighted work, (2) to prepare derivative works based upon the copyrighted work, (3) to distribute copies of the work, (4) to perform the copyrighted work publicly, (5) to display the copyrighted work publicly and (6) to perform the copyrighted work publicly by means of a digital audio transmission.¹⁹³

Anyone who does any act, which the owner has the exclusive right to do, without the permission of the copyright owner, infringes copyright (primary liability).¹⁹⁴

While there is some discussion about whether 17 U.S.C. § 106 ('[...]to do and to *authorize* any of the following [...]') provides the statutory basis for secondary liability¹⁹⁵, it is accepted that U.S. case law generally recognises three types of secondary copyright liability, namely 'contributory liability', 'vicarious liability' and 'inducement liability'.¹⁹⁶ The difference between contributory infringement and vicarious liability has been aptly described by the court in *Demetriades v. Kaufmann* by stating that 'benefit and control are the signposts of vicarious liability' and 'knowledge and participation the touchstones of contributory liability'.¹⁹⁷ In the following the different forms of liability will be outlined and applied to streaming platforms and streaming box distributors.

I. Primary liability

As shown above, and unlike European copyright law, U.S. copyright law does not explicitly provide for a 'communication to the public' and 'making available' right. Yet, the U.S., as a contracting party of the WIPO Copyright Treaty of 1996, is required to implement these rights into national law. The US Copyright Office, however, concluded that the exclusive rights set out in 17 U.S.C. § 106 comprise the substance

¹⁹³ 17 U.S.C. § 106.

¹⁹⁴ 17 U.S.C. § 501.

¹⁹⁵ P Samuelson 'Brief Amici Curiae of 60 Intellectual Property and Technology Law Professors and the United States Public Policy Committee of the Association for Computing Machinery in Support of Respondents in *Metro-Goldwyn-Mayer Studios v. Grokster*' (2005) 20 *BTLJ* 547.

¹⁹⁶ WIPO (prepared by D Seng) 'Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries' (2010), 49 at para 141.

¹⁹⁷ *Demetriades v. Kaufmann* US 690 F. Supp. 289, 293 (S.D.N.Y. 1988).

of the communication to the public and making available right.¹⁹⁸ Within the context of Internet streaming platforms and streaming box distributors, the rights of distribution, public performance and public display are relevant. At the outset it must be stressed that liability of UGC as well as file host streaming platforms for direct copyright infringement is improbable. This is because courts have held that for direct copyright infringement some element of volition or causation is required.¹⁹⁹ Volition is ‘the faculty or power of using one’s will’²⁰⁰. In *Perfect 10 v Giganews* the Ninth Circuit held that if a defendant is ‘passively storing material at the direction of users in order to make that material available to other users upon request, or automatically copying, storing, and transmitting materials upon instigation by others’ the requirement of volition is not met.²⁰¹ In light of this judgement, it seems unlikely that mainstream UGC platforms such as YouTube or file hosts will be held liable for direct copyright infringement as they merely provide storage space.

1. Right of Distribution

According to 17 U.S.C. § 106(3), the copyright owner has the exclusive right ‘to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending’. It is generally accepted that the right of distribution also encompasses the transmission of digital files and it not limited to conveyance of tangible objects.²⁰² Distribution requires an actual dissemination of a copy.²⁰³ The Act defines copies as material objects, other than phonorecords, in which a work is fixed.²⁰⁴ With regard to streaming it is questionable whether a ‘fixed copy’ is created, since the data is ‘buffered’, i.e. it is temporarily stored in the cache and not permanently saved on the user’s computer.²⁰⁵ In a case that addressed the issue of whether or not the loading of software programs into random-access memory (RAM) constitutes a copy, the Ninth Circuit held that for the purposes of the reproduction right such digital information temporarily stored in the RAM constitutes

¹⁹⁸ U.S. Copyright Office, ‘The Making Available Right in the United States’ (2016), 4.

¹⁹⁹ *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995); *CoStar Group, Inc. v LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004).

²⁰⁰ Oxford Dictionaries, Definition of volition, available at:

<https://en.oxforddictionaries.com/definition/volition>.

²⁰¹ *Perfect 10, Inc. v. Giganews, Inc.*, No. 15-55500 (9th Cir. 2017).

²⁰² U.S. Copyright Office op cit (n198) 22.

²⁰³ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007).

²⁰⁴ 17 U.S.C. § 101.

²⁰⁵ See Chapter 2 I.

a copy.²⁰⁶ However, this case did not consider the question whether offering streams constitutes a distribution. This issue was, however, addressed in *United States v. ASCAP*²⁰⁷. The court distinguished between the situation of an Internet stream, where no permanent copy is made, and a download, which includes the making of a copy and concluded that a pure Internet stream does not infringe the right of distribution but rather affects the right of public performance and display.²⁰⁸ Thus, distinguishing whether a host provider merely offers a stream or additionally offers the possibility to download the content may determine whether there is a distribution at all.²⁰⁹

With regard to link sharing and indexing streaming platforms who do not host the content themselves, the ‘server test’ developed by the Ninth Circuit in *Perfect 10 v Amazon.com* has to be noted. Under the ‘server test’, only the person who hosts content on its servers and then makes it available to the public may be deemed to have distributed or displayed copies of the works.²¹⁰ A website that shares links or indexes links merely provides HTML instructions that direct a user's browser to another site where the content is hosted. Providing these instructions is therefore not equivalent to showing or distributing a copy.²¹¹ Thus, as long as link-sharing or indexing streaming platforms do not host files on their own server, they may escape liability of direct infringement of the distribution right. The same applies to streaming box distributors. The add-ons installed on those streaming boxes only provide hyperlinks to other websites who either host or link to streaming content.

2. The public performance right

Under 17 U.S.C. § 106(4) the copyright owner has the right, ‘in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly’. Public performance of a work includes transmitting or otherwise communicating a performance to the public.²¹² ‘Publicly’ means ‘at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and

²⁰⁶ *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517 (9th Cir. 1993).

²⁰⁷ *United States v. ASCAP* 485 F.Supp.2d 438 (S.D.N.Y. 2007).

²⁰⁸ *United States v. ASCAP* 485 F.Supp.2d 438, 444 (S.D.N.Y. 2007).

²⁰⁹ JJ Lunardi op cit (n191) 1100.

²¹⁰ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719 (9th Cir. 2007).

²¹¹ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 710 (9th Cir. 2007).

²¹² 17 U.S.C. § 101.

its social acquaintances is gathered’.²¹³ In *United States v. ASCAP* the court addressed the issue of music streaming and concluded that it constitutes a public performance. It held that the definition of ‘transmit’ includes all conceivable forms and combinations of wires and wireless communications media. Thus, also new forms of communicating works such as streaming are covered by the public performance right.²¹⁴ Furthermore, when assessing whether a stream is a public performance, it is not relevant whether users actually received the work. The offer of a stream is sufficient.²¹⁵ Another issue has been the question whether on-demand streaming can qualify as ‘public’ performance, since the streams are delivered separately to individual recipients. The Supreme Court resolved the issue in its 2014 decision in *American Broadcasting v. Aereo*²¹⁶ where it held that on-demand streaming constitutes a ‘public’ performance, notwithstanding the fact that Aereo transmitted the work to individual subscribers. Aereo was a company that allowed its subscribers to view over-the-air television via live-streams or time-shifted streams. The subscribers could individually select which streams they want to watch. After selecting a stream, Aereo’s system, consisting of thousands of small antennas and a transcoder transmitted the work onto the user’s device.²¹⁷ With regard to the ‘public’ requirement the court argued that an ‘entity may transmit a performance through one or several transmissions, where the performance is of the same work’. Thus, the performance at issue is not the individual transmission, but the underlying broadcast of the work itself. This broadcast was communicated to an indeterminate number of people, regardless of the number of discrete communications.²¹⁸ With regard to the question whether Aereo performed, Aereo argued that they simply provide the equipment to stream the broadcast and that it is the subscriber who chooses which program he wants to watch and at what time he wants to watch it. The court dismissed this argument by emphasising the ‘overwhelming likeness to the cable companies targeted by the 1976 amendments’.²¹⁹

What is clear from the above is that UGC streaming platforms or streaming file hosts, who host the content on their own servers, are performing works publicly within the

²¹³ 17 U.S.C. § 101.

²¹⁴ *United States v. ASCAP* 485 F.Supp.2d 438, 445 (S.D.N.Y. 2007).

²¹⁵ U.S. Copyright Office op cit (n198) 38.

²¹⁶ *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2507 (2014).

²¹⁷ *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2507 (2014).

²¹⁸ *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2508-09 (2014).

²¹⁹ *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2501 (2014).

meaning of 17 U.S.C. 106(4).²²⁰ However, as stated above under Chapter 4Cha I., these sites will most likely not meet the volitional conduct requirement. With regard to link-sharing and link indexing platforms, the situation is not as clear. Under the Ninth Circuit ‘server test’ those sites would not be liable for direct infringement of the public performance or display right since they do not host the content themselves. Although the court in *Perfect 10 v Amazon.com* had to decide whether the public display right was infringed, the server test is also applicable to the public performance right.²²¹ However, it should be noted that this case was dealing with a search engine (Google) which inline linked images from another website and displayed them on their website.²²² The outcome of the case could have been different had it involved streaming platforms who inline link and embed videos which were almost entirely uploaded without the authorization of the copyright owners. These sites seem less like a neutral search engine, such as Google, and more like an infringement tool.²²³ In addition, it should be noted that the ‘server test’ has been rejected by lower courts but was upheld by the U.S. Court of Appeals.²²⁴

Moreover, the finding of Aereo’s direct liability does not affect the liability of such streaming platforms since Aereo used their own servers to transmit the broadcasts. Streaming box distributors do not host content themselves. They merely provide additions on their streaming boxes which contain hyperlinks to websites who host or link to infringing content. Therefore, the legal assessment in terms of link-sharing and indexing sites applies equally to streaming box distributors.

3. The right of public display

Under 17 U.S.C. § 106(5) the copyright owner has the right to display a work publicly or to authorise another person to do so. To ‘display’ a work means ‘to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially’.²²⁵ This definition of display distinguishes it from performing a work, which is defined as ‘to show its images in any sequence or to make

²²⁰ See J Becher op cit (n145) 18; JJ Lunardi op cit (n191) 1112.

²²¹ JJ Lunardi op cit (n191) 1113.

²²² *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1156-57(9th Cir. 2007).

²²³ JJ Lunardi op cit (n191) 1107.

²²⁴ See for example, *Flava Works, Inc v. Gunter* 10 C 6517 (N.D. Ill. 2011); *Flava Works, Inc v. Gunter* 10 No. 11-3190 (7th Cir. 2012).

²²⁵ 17 U.S.C. § 101.

the sounds accompanying it audible'.²²⁶ However, nothing changes with regard to the issue of streaming. Therefore, reference is made to the examination of the public performance right in the previous sub-section.

II. Secondary liability

Although the Copyright Act does not contain a provision according to which someone is liable for a copyright infringement carried out by another person, secondary liability constitutes common-law doctrines that gives rise to liability of indirect infringers.²²⁷ In the following, different forms of secondary liability - vicarious, contributory and inducement liability - will be outlined.

1. Vicarious liability

Vicarious liability is found when there has been a direct infringement and the defendant, firstly, had a direct financial interest in the exploitation of copyrighted material and, secondly, had the right and ability to control the infringing conduct.²²⁸ Importantly, awareness of the infringing conduct is not a requirement.²²⁹

Someone who participates in the revenues of the direct infringer will derive a direct financial benefit. However, most streaming platforms who offer unauthorised streams will gain revenue through advertising. Until now, courts have acknowledged different cases of 'indirect financial benefit' giving rise to vicarious liability. In *A&M Records v Napster*, for instance, the court concluded that Napster, a file-sharing platform, was benefitting from the infringements of their users because the availability of infringing material acts as a 'draw' for future customers.²³⁰ What is noteworthy is the fact that the court even took into account future financials benefits. In *Metro-Goldwyn-Mayer Studios v Grokster*, another case involving a peer-to-peer filesharing software, the Court of Appeal states that 'direct financial benefit, by advertising revenue are undisputed in this case', since 90% of the files that were shared between the users using the Grokster software were copyright protected.

The vast majority of UGC, file host, link-sharing and indexing streaming platforms

²²⁶ Ibid.

²²⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, No. 81-1687, 417, (9th Cir. 1984).

²²⁸ *Shapiro, Bernstein & Co. v. HL Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963).

²²⁹ Ibid.

²³⁰ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001).

offer their services for free and gain financial benefit from advertising.²³¹ As shown in the *Napster* and *Grokster* cases, advertisement revenues can be sufficient when the infringing material acts as a ‘draw’ for future users.

As for the right and ability to supervise the infringing conduct, the defendant must have the practical and legal ability to control its users.²³² Before uploading a video on a UGC platform, such as YouTube, a user usually has to sign up. In these cases the UGC platforms do have the ability to block a user. They are also able to monitor files that were uploaded onto their platform. As a result, it is argued here that streaming platforms must monitor their content as well as block users to escape imposition of vicarious liability.²³³

2. Contributory liability

Contributory liability stems from the tort law principle that one who directly contributes to another’s tort should also be held liable.²³⁴ According to this principle, a party who knows about the infringement and ‘induces, causes, or materially contributes to the infringing conduct’ is liable for contributory infringement.²³⁵

With regard to the knowledge requirement, actual knowledge and constructive knowledge are sufficient.²³⁶ A party has constructive knowledge if he or she has reason to know that an infringement is taking place.²³⁷ In the landmark decision *Sony v Universal City Studios*²³⁸ the U.S. Supreme Court further developed the knowledge requirement. According to the court, constructive knowledge could only be established if the service of the defendant was not capable of substantial non-infringing use (so called ‘Sony defence’).²³⁹ If the service or product is capable of non-infringing use, the plaintiff has to proof that the defendant ‘had specific knowledge of infringement at a time when they contributed to the infringement and failed to act upon that

²³¹ C Wankel *Cuttingedge Social Media Approaches to Business Education: Teaching with LinkedIn, Facebook, Twitter, Second Life, and Blogs* (2010) 101.

²³² J Becher op cit (n145) 21.

²³³ JC Breen ‘YouTube or YouLose? Can YouTube Survive a Copyright Infringement Lawsuit’ (2007) 16 *Tex. Intell. Prop. L.J* 170.

²³⁴ MA Leaffer *Understanding Copyright Law* 6ed (2014) 426.

²³⁵ *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.* 443 F.2d 1159, 1162 (2d Cir. 1971).

²³⁶ *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1020 (9th Cir. 2001).

²³⁷ *Sega Enters. Ltd. v. MAPHIA* 948 F. Supp. 923, 933 (N.D. Cal. 1996).

²³⁸ *Sony Corp. of America Universal City Studios, Inc.* 464 U.S. 417 (1984)

²³⁹ *Ibid.*

information.²⁴⁰ However, the defendant can still be held liable, if he cannot provide evidence for actual non-infringing use.²⁴¹ This means that a contributory infringer cannot obtain immunity by using encryption to avoid knowledge.

UGC and file host streaming platforms provide an infrastructure for storing and displaying information. In addition, UGC platforms usually also provide for a search function to locate the copyrighted files. Therefore, they materially contribute to the infringing conduct. The same applies to link-sharing and link indexing platforms and streaming box distributors. Thus, the finding of contributory liability will depend on the knowledge requirement. As UGC and file host streaming platforms run automatically, they will most likely not have actual knowledge. Moreover, constructive knowledge would require that these sites are not capable of non-infringing uses. As streaming boxes are also capable of non-infringing uses, the knowledge requirement will be hard to substantiate for the plaintiff. With regard to link-sharing and link indexing platforms, actual knowledge and constructive knowledge seems to be easier to substantiate, since the majority of these sites are designed to facilitate access to copyright protected works.²⁴²

3. Inducement liability

As shown above, constructive knowledge cannot be construed if the defendant's service or product is capable of substantial non-infringing use and if the defendant does not have specific knowledge of the infringement.²⁴³ However, this does not mean that a party cannot be held liable for secondary infringement. In *Metro-Goldwyn-Mayer Studios v Grokster* the U.S. Supreme held that 'one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.'²⁴⁴ Therefore, wilful blindness does not protect from secondary liability, if one distributes a device or service with the intent to induce copyright infringement.²⁴⁵

²⁴⁰ *Metro-Goldwyn-Mayer Studios Inc. v Grokster, Ltd.* 545 U.S. 913, 915 (2005).

²⁴¹ *In re Aimster Copyright Litigation* 334 F.3d 643 (7th Cir. 2003).

²⁴² JJ Lunardi op cit (n191) 1118.

²⁴³ See Chapter 4 II.2.

²⁴⁴ *Metro-Goldwyn-Mayer Studios Inc. v Grokster, Ltd.* 545 U.S. 913, 915 (2005).

²⁴⁵ MA Kupperts op cit (n164) 240.

Another case where a defendant has been held liable because of inducement is *Columbia Pictures Industries v Fung*²⁴⁶. Gary Fung was the operator of several BitTorrent indexing sites similar to The Pirate Bay²⁴⁷. The Ninth Circuit observed that Fung had promoted the use of his BitTorrent sites to infringe copyright by encouraging his users to upload torrent files concerning copyrighted content and by, for example, providing a ‘list of “Box Office Movies,” containing the 20 highest-grossing movies then playing in U.S. theaters.’²⁴⁸ The court concluded that the websites of Fung were designed to direct users to copyright infringing material, therefore, he has the intent to induce copyright infringement.²⁴⁹

With regard to link-sharing and link indexing streaming platforms the situation seems to be similar, at least for the majority of sites who collect links and index links to copyright protected material. However, they would also have to induce their users to infringe copyright. As pointed out under Chapter 4 I.1., it is not always clear whether end-users who watch streams infringe the copyright owner’s right of reproduction, since temporary storage takes place in the RAM. Thus, no copy of the work remains stored on the end-user’s computer.²⁵⁰ Yet, users definitely infringe copyright by uploading content onto host sites. In as far as streaming platforms encourage their users to upload copyright protected material by, for example, specifically requesting their users to upload or post links to movies or television programs, they are most likely liable under the inducement rule.

With respect to streaming box distributors, marketing efforts that highlight the access to copyright protected material which was uploaded without the authorisation of the copyright owner, would likely meet the standards of inducement. However, there must be an underlying direct infringement. The streaming platforms to which the streaming box provides access are probably infringing copyright but the distributors are not inducing them to infringe copyright by selling streaming boxes to their customers. The

²⁴⁶ *Columbia Pictures Industries, Inc. v Fung* 710 F.3d 1020 (9th Cir. 2013).

²⁴⁷ See Chapter 3 II.5.

²⁴⁸ *Columbia Pictures Industries, Inc. v Fung* 710 F.3d 1020, 1036 (9th Cir. 2013).

²⁴⁹ *Ibid.*

²⁵⁰ See E Haber ‘Copyrights in the Stream: The Battle on Webcasting’ 28 *Santa Clara High Tech. L.J.* 771 (2012).

customers who watch unauthorised streams are arguably not infringing at all.²⁵¹

III. The DMCA Safe Harbour Provisions

In 1998, the ‘Online Copyright Infringement Liability Limitation Act’ was enacted as part of the Digital Millennium Copyright Act (DMCA).²⁵² 17 U.S.C. § 512 sets out the conditions under which online service providers (OSPs) are exempted from liability. Unlike the E-Commerce Directive, the DMCA governs liability ‘vertically’, meaning that it does not deal with liability of intermediaries across all types of content but only lays down rules for the special domain of copyright law.²⁵³ For the purposes of this thesis, 17 U.S.C. § 512(c) and (d) are of interest. Section § 512(c) provides for limitation of liability for ‘Information Residing on Systems or Networks At Direction of Users’. This section applies, in particular, to UGC streaming platforms and file host streaming platforms. With respect to link-sharing and link indexing streaming platforms, section § 512(d) applies. In the following, the general requirements will be briefly discussed together since both sections have basically the same requirements and are similar to the hosting safe harbour provision of the E-Commerce Directive.

1. General Requirements for Safe Harbour Protection under 17 U.S.C § 512(c) and (d)

First, one must qualify as an OSP, which is defined in § 512(k) as a ‘provider of online services or network access, or the operator of facilities therefor’. Next, the OSP must ‘not have actual knowledge that the material or an activity using the material on the system or network is infringing’.²⁵⁴ In the case that the OSP does not have actual knowledge, it must not be aware of facts or circumstances from which infringing activity is apparent.²⁵⁵ If the OSP obtains knowledge – usually through a takedown-notice – of the infringing activity or of facts from which the activity is apparent, it must remove or disable access to the material expeditiously.²⁵⁶ In a case where an OSP has the right and ability to control the activity of its users, it must not directly benefit

²⁵¹ See A Bridi ‘Copyright Liability For Streaming Box Distributors: A Comparative EU-US Perspective’ (2017), available at <http://cyberlaw.stanford.edu/blog/2017/04/copyright-liability-streaming-box-distributors-comparative-eu-us-perspective>.

²⁵² See Public Law No. 105-304, 112 Stat. 2860, 2877.

²⁵³ L Edwards, WIPO ‘Role And Responsibility Of Internet Intermediaries In The Field Of Copyright And Related Rights’ (2010) 7.

²⁵⁴ 17 U.S.C. § 512(c)(1)(A)(i).

²⁵⁵ 17 U.S.C. § 512(c)(1)(A)(ii).

²⁵⁶ 17 U.S.C. § 512(c)(1)(A)(iii).

from it financially.²⁵⁷ Finally, the OSP must have a designated an agent to receive notifications of claimed infringement and publish its contact information on its website.²⁵⁸ Just like the E-Commerce Directive, the DMCA clarifies that OSPs are not required to monitor their services or affirmatively seeking facts indicating infringing activity.²⁵⁹

2. The safe harbour provisions' effect on streaming host providers and streaming box distributors

It will be very difficult for a plaintiff to establish actual knowledge of a UGC streaming platform or file host. In *Viacom v. YouTube*²⁶⁰, a case involving several content owners (film studios, music publishers, television networks) who sued YouTube for direct and secondary copyright infringement, the Second Circuit clarified that actual knowledge requires that the OSP subjectively knew of specific infringement.²⁶¹ The burden of proof relies on the plaintiff.²⁶² It will be almost impossible for a plaintiff to prove such actual knowledge. Furthermore, 'red-flag knowledge', i.e. awareness of facts or circumstances from which infringing activity is apparent, also requires that a specific and identifiable work is being infringed.²⁶³ This means that even though a UGC streaming platform might have knowledge that there is widespread copyright infringement on its platform, this alone does not suffice to establish knowledge of specific infringements.²⁶⁴ The typical UGC and file host streaming platforms will, therefore, mostly meet the requirement of not having actual knowledge.

However, one could argue that such sites are vicariously liable because they benefit financially from the infringing activity and have the right and ability to control it. In this context, the Second Circuit held that the plaintiff has to show 'something more' than the power to remove or block access to material posted on its website.²⁶⁵ 'Something more' would be a detailed instruction to users about what content to

²⁵⁷ 17 U.S.C. § 512(c)(1)(B).

²⁵⁸ 17 U.S.C. § 512(c)(2).

²⁵⁹ 17 U.S.C. § 512(m).

²⁶⁰ *Viacom Int., Inc. v. YouTube*, 676 F.3d 19 (2d Cir. Apr. 5, 2012).

²⁶¹ *Viacom Int., Inc. v. YouTube*, 676 F.3d 19, 31 (2d Cir. Apr. 5, 2012).

²⁶² *Viacom Int., Inc. v. YouTube* 07 Civ. 2103 (LLS) (S.D.N.Y 2013).

²⁶³ *Viacom Int., Inc. v. YouTube*, 676 F.3d 19, 30 (2d Cir. Apr. 5, 2012).

²⁶⁴ RJ Williams, 'The Second Circuit Serves up Some Knowledge in *Viacom v. YouTube*' 48 *New Eng. L. Rev.* 666 (2014).

²⁶⁵ *Viacom Int., Inc. v. YouTube*, 676 F.3d 19, 38 (2d Cir. Apr. 5, 2012).

upload or editing the content.²⁶⁶ Eventually, the court held that YouTube can rely on the safe harbour in 17 U.S.C. § 512(c). Thus, UGC or file host streaming platforms who correspond to takedown-notices and do not induce or participate in infringing activities are protected under the safe harbour regime of the DMCA.

Whether link-sharing or indexing streaming platforms can rely on 17 U.S.C. § 512(d) depends on the structure of the site. When such a site, similar to UGC streaming platforms, is purely run by its users and does not induce its users to link to copyright protected material or merely provides links that give access to infringing works, it may qualify for safe harbour protection. However, many link-sharing and indexing streaming platforms focus exclusively on linking to copyrighted material. These sites will most likely have actual knowledge of specific infringements or at least are aware of facts or circumstances from which the specific infringing activity is apparent.

IV. Comparative considerations

In both the EU and the U.S. the question whether streaming platforms can be held liable for copyright infringement depends on judge-made law. This is remarkable with regard to EU copyright law, which is mostly influenced by civil law countries, since judge-made law is usually associated with common law systems.²⁶⁷ In the EU, primary liability of host providers or other third parties is assessed through an examination of the communication to the public right, including the making available right under Article 3 of the InfoSoc Directive. As mentioned above, U.S. copyright law does not explicitly provide for a ‘communication to the public’ and ‘making available’ right. Yet, according to the Copyright Office and a majority of scholars, the substance of the making available right is incorporated in the exclusive rights set out in 17 U.S.C. § 106.²⁶⁸

However, the CJEU seems to follow a more expansive approach when it comes to finding intermediaries or third parties liable for primary infringement of the communication to the public right. This is mainly due to the fact, that secondary liability is not harmonised on EU level, which is arguably why the CJEU tries to

²⁶⁶ *Viacom Int., Inc. v. YouTube* 07 Civ. 2103 (LLS) (S.D.N.Y. 2013).

²⁶⁷ A Frohlich ‘The European Union as a Mixed Legal System’ (2014), available at <https://comparelex.org/2014/06/05/the-european-union-as-a-mixed-legal-system/>.

²⁶⁸ U.S. Copyright Office op cit (n198) at 81.

achieve further harmonisation in this area by expanding the notion of communication to the public and making available.²⁶⁹ Thus, cases in the EU, which are analysed under the rubric of primary infringement, would be addressed as potential secondary infringements in the U.S. In the following, some cases will be analysed that are of particular importance in the context of streaming platforms and streaming box distributors, and which illustrate the different approaches.

1. Link indexing sites and link-sharing sites

As discussed above, the CJEU ruled in *The Pirate Bay*²⁷⁰ that by indexing user-provided torrent files to content hosted by users that it knows to be infringing, and by providing a search function and categories to locate the files, TPB communicated works to the public and was therefore a primary infringer. The most likely analogous case would be *Pictures Industries v Fung*²⁷¹, which also dealt with a BitTorrent indexing site. The Ninth Circuit did not even discuss primary infringement but held Fung liable as a secondary infringer for inducement. This seems to be the more natural approach, since the users of such torrent indexing sites are the direct infringers, whereas the platform is effectively only contributing to/ inducing these direct infringements.

Another difference is that the Ninth Circuit also examined whether Fung could rely on one of the safe harbour provisions of the DMCA. By contrast, the CJEU in *The Pirate Bay* omitted any reference to the exemptions of the E-Commerce Directive and, in particular, the hosting safe harbour provision. The reason can be found in Recital 42 and Article 14(2) of the E-Commerce Directive. These provisions indicate that the safe harbour provisions only relate to liability for providers for third party infringements, not for primary infringement of the provider itself.²⁷² At first glance, this does not seem to make a big difference, since torrent indexing sites like TPB will most likely have ‘red-flag’ knowledge and can thus be held liable. Nevertheless, the Ninth Circuit pointed out that it ‘is conceivable that a service provider liable for inducement could be entitled to protection under the safe harbours’, and in such cases the different approaches would lead to different results.

²⁶⁹ See Chapter 3 II.7.

²⁷⁰ *Stichting Brein v Ziggo* EU (CJEU) C-610/15.

²⁷¹ *Columbia Pictures Industries, Inc. v Fung* 710 F.3d 1020 (9th Cir. 2013).

²⁷² E Rosati op cit (n124) at 12.

With respect to the issue of linking, the CJEU decided that the provision of links can constitute the making available of a work to the public when it is used to circumvent restrictions of another website or if it provides access to copyrighted content that was uploaded without the consent of the copyright owner and the defendant has knowledge hereof.²⁷³ In contrast, the U.S. Supreme Court held that only the person who hosts content on its servers and then makes them available to the public may be deemed to directly infringe copyright.²⁷⁴ As a result, a platform who shares or indexes links can only be held secondary liable under U.S. copyright law. In this context, it should be noted that the required direct infringement is not always clear when it comes to end-users watching streams.²⁷⁵ The distinction between primary and secondary liability may in many cases make little difference when some form of liability can be established under both jurisdictions. However, a significant difference between the EU and the U.S in terms of linking is the CJEU's approach that knowledge of the infringing content/activity can be presumed when the defendant's site is revenue generating.²⁷⁶ Such a presumption of knowledge does not exist under U.S. copyright law.²⁷⁷ Therefore, this creates a greater risk of liability for link-sharing and indexing platforms in the EU. In addition, U.S. copyright law provides for a 'linking' safe harbour²⁷⁸, whereas the E-Commerce Directive does not.

2. Streaming Box Distributors

The CJEU decided in the *Filmspeler*²⁷⁹ case that the distribution of a streaming box with preinstalled add-ons, which provides access to unauthorised streaming content, constitutes a communication to the public. Under U.S. law, however, this would either be a case of inducement liability or contributory liability. The key issue in terms of inducement is the underlying infringement. As already stated above, it is not clear whether users who watch streams do indeed infringe U.S. copyright law by reproducing the work, since such a reproduction is only temporary.²⁸⁰ The hosting

²⁷³ See Chapter 3 II.3

²⁷⁴ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719 (9th Cir. 2007).

²⁷⁵ See Chapter 4 I.1.

²⁷⁶ *GS Media v Sanoma Media and others* EU (CJEU) C-160/15 at para 51; A Bridy 'Brein v Ziggo: The Pirate Bay Dies Again' (2017), available at <http://cyberlaw.stanford.edu/blog/2017/06/brein-v-ziggo-pirate-bay-dies-again>.

²⁷⁷ See *Viacom Int., Inc. v. YouTube* 07 Civ. 2103 (LLS) (S.D.N.Y 2013).

²⁷⁸ 17 U.S.C. § 512(d).

²⁷⁹ *Stichting Brein v Jack Frederik Wullems* EU (CJEU) C-527/15.

²⁸⁰ See Chapter 4 I.1.

platforms definitely infringe copyright but are most likely not induced by the streaming box distributor. If end-users are not infringers, and the platforms are not induced²⁸¹, only contributory liability is possible. A streaming distributor could be held liable if a plaintiff can show that a streaming distributor knows about the infringement of the unauthorised streaming platforms that the add-ons link to, and that it materially contributes to the infringement by directing its customers to the infringing platforms. However, it has to be noted that a plaintiff would have to prove that the defendant ‘had specific knowledge of infringement at a time when they contributed to the infringement and failed to act upon that information’.²⁸²

3. UGC streaming platforms and file host streaming platforms

Until now, no decisions exist on EU level concerning the liability of UGC or file host streaming platforms. It is not clear whether such platforms infringe the right of communication to the public, including the making available right, when its users upload copyright infringing material onto the site. As shown under Chapter 4 IV.1., the finding of primary liability would mean that such sites would not be able to rely on the hosting safe harbour regime. Therefore, it seems unlikely that at least the mainstream hosts, such as YouTube, which take active steps to minimise the risk of copyright right infringement²⁸³ and correspond to takedown notices, would be held liable for direct copyright infringement. Under U.S. law, at least the mainstream providers are protected by the DMCA safe harbour provisions as far as they correspond to takedown-notices and do not induce or participate in infringing activities.²⁸⁴

²⁸¹ A Bridy op cit (n43)

²⁸² *Metro-Goldwyn-Mayer Studios Inc. v Grokster, Ltd.* 545 U.S. 913, 915 (2005).

²⁸³ For Example, YouTube Content ID.

²⁸⁴ *Viacom Int., Inc. v. YouTube* 07 Civ. 2103 (LLS) (S.D.N.Y 2013); *Io Group, Inc. v Veoh Networks, Inc.* 586 F. Supp. 2d 1132 (N.D. Cal. 2008).

CHAPTER 5: LIABILITY OF STREAMING PLATFORMS AND STREAMING BOX DISTRIBUTORS IN SOUTH AFRICA

Copyright law in South Africa is provided for, and regulated by, the Copyright Act 98 of 1978 (hereinafter the Act) and the Regulations²⁸⁵ under this Act. South African copyright law recognises primary and secondary infringement. It is primary when the infringer does, or authorises another person to do, any of the acts that fall within the listed exclusive rights.²⁸⁶ It is secondary when a person deals in infringing articles, for example when the person knowingly and without the consent of the copyright owner imports an already existing infringing copy, that he may not himself have reproduced.²⁸⁷ In the context of South African copyright law, a distinction must be made between indirect or secondary *infringement* and secondary or indirect *liability*. Secondary liability deals with the question whether a person is liable for direct copyright infringement of a third party, whereas secondary infringement occurs where a person deals in infringing works. The latter will not play a role for the purposes of this study.

To date, there have been no cases decided by South African courts relating to secondary liability for copyright infringement online. As copyright infringement can also constitute a statutory delict, the general delictual principles concerning participation or joint tortfeasance may be applicable in relation to copyright infringement.²⁸⁸ Copyright scholars have suggested that secondary liability falls within the terms of section 23(1) of the Copyright Act, which extends liability to any person who ‘causes’ another person to do any of the exclusive acts.²⁸⁹

I. Primary liability

Sections 6 to 11 of the South African Copyright Act stipulate for each category of copyrighted works which acts may be done or authorised exclusively by the copyright owner. As a result, these rights differ from one category of works to another. At the outset, it should be noted that South Africa has up to now not introduced the rights of

²⁸⁵ Copyright Regulations, 1978, GN R2530, GG 6251, 22 December 1978.

²⁸⁶ S 23(1) of the Copyright Act of 1978.

²⁸⁷ S 23(2) of the Copyright Act of 1978.

²⁸⁸ O Dean, A Dyer, *Introduction to Intellectual Property Law* (2014) 432.

²⁸⁹ O Dean *Handbook of South African Copyright Law* Revision 14 (2012) 1-50; DP van der Merve *Information and Communications Technology Law* 2ed (2016) 322.

‘communication to the public’ and ‘making available’, which were, elsewhere, specifically designed to grant copyright owners the right to better control the transmission of their works over the Internet.²⁹⁰ However, the introduction of such rights is currently discussed, in connection with the Copyright Amendment Bill 2017, for literary, musical, and artistic works; sound recordings and cinematograph films and audiovisual fixations.²⁹¹ This will be analysed separately below.

With regard to streaming platforms and streaming box distributors the relevant provisions are currently sections 6(c) [for literary and musical works], 8(1)(b) [for cinematograph films] and 9(e) [for sound recordings]. Before looking at these provisions in more detail, it is noteworthy, that the general right to broadcast a work²⁹² does arguably not apply to the distribution of works over the internet because it only covers the distribution by means of electromagnetic waves without an artificial conductor.²⁹³ Furthermore, it seems that the right to transmit a work in a diffusion service²⁹⁴ does also not apply in these cases. It only covers transmissions that take place over wires or other paths provided by material substance and thus does not encompass the dissemination of works over the Internet.²⁹⁵

1. Right to perform a literary or musical work in public

Section 6(c) provides for the exclusive right to perform literary and musical works in public. The Act does not define what public means. South African case law has pointed out, however, that the character of the audience is the crucial factor. It must be a large number of people that are unrelated or unknown to each other and it must be more than the domestic or quasi-domestic circle that has access to the provided service.²⁹⁶ Streaming platforms can be accessed by anyone with an Internet connection. Thus, they are directed to the public. The question remains whether streaming platforms or streaming box distributors qualifies as “performing” works. The Act states that ‘perform’ in relation to a work shall be construed accordingly to ‘performance’. Performance is defined as ‘any mode of visual or acoustic presentation of a work,

²⁹⁰ D van der Merwe *Information and Communications Technology Law* 2ed (2016) 309.

²⁹¹ Copyright Amendment Bill 2017 at paras 4. - 7.

²⁹² See s 6(d), s 8(1)(b) and s 9(e) of the Act

²⁹³ O Dean, A Dyer op cit (n288) 403.

²⁹⁴ S 8(1)(d)

²⁹⁵ S 1 of the Act.

²⁹⁶ *Southern African Music Rights Organisation Ltd v Svenmill Fabrics (Pty) Ltd* 1983 1 SA 608 (C) 611.

including any such presentation by the operation of a loudspeaker, a radio, television or diffusion receiver or by the exhibition of a cinematograph film or by the use of a record or by any other means [...]’.²⁹⁷ Although the definition does not expressly mention the presentation of a work over the Internet, one could argue that modern forms of communicating works such as streaming should be read into the right to perform in public. However, the same issues and questions as in the context of U.S. copyright law and the public performance right would then arise in relation to South African copyright law (i.e. are services like on-demand covered and does the ‘server test’ apply?), see Chapter 4 I.2 above. In any event, it should be noted that the applicability with regard to streaming is rather limited since the right to perform in public only applies to musical and literary works.

2. Right to cause a cinematograph film to be seen in public

According to section 8(1)(b) the copyright owner of a cinematograph film has the exclusive right to do or to authorise the act of ‘causing the film, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public’. Since the Act does not define the term ‘causing’, one could argue that any causal connection is sufficient. Then UGC, file host, link-sharing and indexing streaming platforms as well as streaming box distributors would, strictly speaking, all cause the film to be seen in public. However, this interpretation seems excessive in that it would even encompass the smallest contribution. It is more likely, therefore, that a South African court would interpret the provision in a way consistent with the interpretation of the ‘public display’ right by U.S. courts. As discussed in Chapter 4 I.2., public display in the context of streaming requires the work to be hosted by the alleged infringer. Applying this standard to s8(1)(b), UGC and file host streaming platforms could be would cause films to be seen in public. Link-sharing, link-indexing platforms and streaming box distributors, however, do not host content themselves and are therefore not causing films to be seen in public.

3. Communicating sound recordings to the public

According to section 9(e) of the South African Copyright Act, the copyright owner of a sound recording has the exclusive right to communicate the sound recording to the public. The term ‘sound recording’ is defined as ‘any fixation or storage of sounds, or

²⁹⁷ Section 1 of the Copyright Act.

data or signals representing sounds, capable of being reproduced, but does not include a sound-track associated with a cinematograph film'.²⁹⁸

As the definition indicates, the right is of limited applicability in the context of streaming. It would only be applicable in terms of music streaming platforms. However, a South African court could apply the CJEU's principles in terms of the communication to the public right. Although the wording of section 9(e) does not expressly include the 'making available' right, this right is usually put under the umbrella of the communication to the public right.²⁹⁹ Therefore, a court could interpret section 9(e) as to cover the making of works available to the public.³⁰⁰ Nevertheless, one should bear in mind that the extensive approach of the CJEU in terms of the communication to the public and making available right stems from the fact that copyright law, in particular secondary liability, is not fully harmonised on EU level.

II. Secondary liability

As previously stated, there have been no reported cases in South Africa which involved secondary liability of an Internet intermediary. Therefore, the principles of 'contributory liability' or 'inducement liability' developed by U.S. case law have not been established under South African case law. Section 23(1) extends liability to persons who *cause* other persons to do any of the restricted acts. The term 'cause' is broad enough to include these principles of 'contributory liability' and 'inducement liability'.³⁰¹ Furthermore, whilst copyright is specifically protected in the Copyright Act, it is also protected by delictual law, as far as it does not conflict with the Copyright Act.³⁰² The general common law principle that anyone who instigates, assists, or abets to the commission of a wrongdoing has been applied in the context of copyright law in *Haupt t/a Softcopy v Brewers Marketing Intelligence*³⁰³. In that case, one of the respondents co-operated with and assisted the other respondents in the copyright infringement of a computer program by providing parts of the source code. As a result,

²⁹⁸ S 1 Definition of 'sound recording' of the Act.

²⁹⁹ A Tsoutsanis 'Why copyright and linking can tango' (2014) 9 *JILP* 499.

³⁰⁰ The principles concerning the making available right in the EU were discussed above in Chapter Chapter 3.

³⁰¹ WIPO (prepared by D Seng) 'Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries' (2010) at para 120.

³⁰² AIPPI 'Report Q204 Liability for Contributory Infringement of IPRs' 2, available at https://aippi.org/download/committees/204/GR204south_africa.pdf.

³⁰³ *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Ltd. and Others* 2006 (4) SA 458 (SCA) at para 46.

he was also held liable for copyright infringement pursuant to section 23(1).³⁰⁴ Moreover, South African law of delict also recognises vicarious liability, i.e. the strict liability of one person for the wrongdoing of another.³⁰⁵ Just as in U.S. law, it requires the right and ability to control the infringing conduct and a direct financial interest.³⁰⁶

Under common law, instigating, assisting or abetting in the infringement of another person only leads to liability, however, if the secondary infringer knew or had reason to know that (s)he participated in a delictual wrong.³⁰⁷ On the other hand, where a person ‘causes’ another person to infringe copyright in terms of section 23(1) of the Act, knowledge is not required. This is a difference to the U.S. approach, where secondary liability requires some kind of knowledge. Therefore, in the case of UGC and file host streaming platforms as well as streaming box distributors, where it is difficult to substantiate knowledge under the U.S. ‘contributory infringement’ principles³⁰⁸, South African courts could apply a more extensive approach, since section 23(1) does not require knowledge of the unlawful conduct.

III. Safe Harbour provisions in the Electronic Communications and Transactions Act of 2002

In 2002, the South African parliament enacted the Electronic Communications and Transactions Act (ECTA). Chapter XI of the ECTA provides for liability exemptions for service providers. Service providers are persons providing information system services.³⁰⁹ Information system is defined as a ‘system for generating, sending, receiving, storing, displaying or otherwise processing data messages [which system] includes the Internet’.³¹⁰ This definition encompasses those who perform the functions that make the Internet available to users, not everyone using the Internet.³¹¹ In order to avail itself of the liability exemptions, the service provider must meet two threshold requirements: (1) it must be a member of an industry representative body for service providers and (2) it must adopt and implement the official code of conduct of that

³⁰⁴ Ibid.

³⁰⁵ J Neethling, JM Potgieter, PJ Visser *Law of Delict* 7ed (2014) 365.

³⁰⁶ Ibid. The principles of vicarious liability and contributory liability were discussed in Chapter 4 II.

³⁰⁷ E.g. *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T).

³⁰⁸ See Chapter 4 II.2

³⁰⁹ S 70 of the ECTA

³¹⁰ S 1 Definition of ‘information system’ of the ECTA.

³¹¹ van der Merwe op cit (n290) 330.

representative body.³¹² An industry representative body in terms of section 71 of the ECTA is, for example, the Internet Service Providers' Association (ISPA). For the purposes of this thesis, the safe harbour provisions contained in section 75 (hosting) and section 76 (information location tool) are of importance. The safe harbour provisions are modelled on the DMCA safe harbour provisions. However, unlike the DMCA, they apply horizontally, meaning not only for copyright infringements. In the following, requirements of sections 75 and 76 will be outlined and applied to the different types of streaming services.

1. Section 75: Hosting

Section 75 indemnifies a service provider from damages for providing services that consist of the storage of data that is provided by a recipient of the service, as long as it does not have actual knowledge of the infringing information, is not aware of facts or circumstances from which the infringement is apparent and as long as he upon receipt of a takedown notification acts expeditiously to remove or to disable access to the data.³¹³

2. Section 76: Information Location Tools

Section 76 indemnifies a service provider from damages for referring or linking users to a web page containing infringing content by using information location tools, as long as it does not have actual knowledge of the infringing information, is not aware of facts or circumstances from which the infringement is apparent, does not receive a financial benefit from the infringing activity and removes, or disables access to, the reference or link to the infringing activity within a reasonable time after being informed of the infringing nature of the activity.³¹⁴

3. The notice-and-takedown procedure in section 77

Section 77 of the ECTA sets out a detailed notice-and-takedown procedure. In terms of this procedure someone who has become aware of infringing activity may notify the service provider of the infringement and require it to remove or disable access to the unlawful content. Section 77(1) of the ECTA sets out the requirements for a valid notification. In order to minimise the likelihood of fraudulent notifications, section

³¹² S 72 of the ECTA.

³¹³ S 75 of the ECTA.

³¹⁴ S 76 of the ECTA.

77(2) of the ECTA states that anyone who notifies a service provider of unlawful activity and knows that the notification misrepresents the facts is liable for the damages caused by a wrongful takedown. Moreover, section 77(3) provides that a service provider cannot be held liable for a wrongful takedown in response to a notification. Just as the safe harbour provisions of the DMCA and the E-Commerce Directive, the ECTA's safe harbour indemnities state that the service providers are not under a general obligation to monitor the data that they transmit.³¹⁵

4. Application to streaming services

With regard to streaming platforms, the threshold requirement of being a member in an industry representative body for service providers should be noted. This requirement has the effect that only South African service providers within a closed group of the industry will typically qualify for the limitations.³¹⁶ Therefore, most UGC, file host, link-sharing and indexing streaming platforms are not afforded protection from liability under the ECTA.³¹⁷ In addition, as the majority of link-sharing and link-indexing streaming platforms are linking to copyrighted content, they will most likely not meet the codes of conduct of the representative body. Notwithstanding the above, it is noteworthy that the hosting safe harbour provision of the ECTA does not require the host to not receive a financial benefit directly attributable to the infringing activity. Therefore, UGC or file host streaming platforms who profit directly from the infringing content can still qualify for immunity under section 75, as long as they comply with the notice-and-takedown procedure and do not have specific knowledge of the infringing activity. However, this does not apply to link-sharing and link-indexing streaming platforms, since the 'linking' safe harbour provision in section 76 of the ECTA states that such service providers are not allowed to receive a financial benefit directly attributable to the infringing in order to qualify for the safe harbour protection.³¹⁸

³¹⁵ S 78(1) of the ECTA.

³¹⁶ WIPO (prepared by D Seng) 'Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries' (2010) at para 126.

³¹⁷ See A Cominos, 'Intermediary liability in South Africa' (2012) 14-15, available at https://www.apc.org/sites/default/files/Intermediary_Liability_in_South_Africa-Comminos_06.12.12.pdf (accessed on 5 February 2018).

³¹⁸ S 76(c).

IV. The Copyright Amendment Bill 2017

In 2015, the Minister of Trade and Industry published a bill to extensively amend the Copyright Act of 1978.³¹⁹ A revised version thereof was introduced to Parliament on 16 May 2017.³²⁰ While the Bill has not been finalised at the time of writing this thesis, for the purposes of this study and with regard to the issue of unauthorised streaming, two specific proposed amendments are of particular interest. First, the Bill proposes to introduce new exclusive right of ‘communication to the public’ and ‘making available’ for literary, musical, and artistic works as well as cinematograph films, audiovisual fixations and sound recordings.³²¹ Secondly, the Bill proposes to also introduce an exemption for temporary reproductions and adaption by inserting section 13A in the Copyright Act.

1. Communication to the public

The new exclusive right reads as follows:

‘communicating the work to the public, by wire or wireless means, including by means of internet access and the making of the work available to the public in such a way that any member of the public may access the work from a place and at a time chosen by that person, whether interactively or non-interactively;’³²²

The wording is very similar to Article 8 of the WIPO Copyright Treaty (WCT), which was created to grant copyright owners the right to control the transmission of their works over the internet.³²³ As shown above, the wording of the current exclusive rights are outdated and do not really address new technologies such as streaming. Therefore, the introduction of such a communication to the public and making available right is necessary and welcome in order to bring South Africa’s copyright law in line with the digital era and cover new ways of disseminating works such as Internet TV, webcasting, video-on-demand and other streaming technologies. However, the numerous decisions of the CJEU in relation to the ‘communication to the public’ and ‘making available’ right in Article 3 of the InfoSoc Directive show the complexity of

³¹⁹ Copyright Amendment Bill 2015, available at <https://publishsa.co.za/file/1495524950kzv-copyrightamendmentbill.pdf> (last accessed on 5 February 2018).

³²⁰ Copyright Amendment Bill 2017, available at https://libguides.wits.ac.za/ld.php?content_id=32174808 (last accessed on 5 February 2018).

³²¹ Ibid.

³²² Copyright Amendment Bill 2017

³²³ van der Merwe op cit (n290) 309; South Africa has signed the WCT but has not yet ratified it.

that right.³²⁴ For instance, the legal status of linking has been altered and amended in several decisions of the CJEU, which lead to legal uncertainty.³²⁵

In contrast to the wording of Article 3 of the InfoSoc Directive, the Bill adds that the person may access the work either ‘interactively or non-interactively’. This addition appears to be superfluous since the making available right covers interactive communication (on-demand streams) and non-interactive communication (e.g. webcasting) is covered by the communication to the public right.³²⁶

2. Section 13A

Section 13A of the Bill provides for an exception for temporary reproductions and adaptations. The exception reads as follows:

Any person may make transient or incidental copies of a work, including reformatting an integral and essential part of a technical process, if the purpose of those copies or adaptations is

- (a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work; or
- (b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent economic significance to these acts.

Until now, a difference between South African and European copyright law was the absence of an exception for ‘temporary/transient copies’ in South African law. The Bill now proposes to introduce such an exception through the insertion of section 13A.³²⁷ Such an exception would affect streaming platforms as follows: In general, secondary liability requires a direct infringement of a third party. As discussed under Chapter 4 II., in the context of streaming platforms and streaming box distributors, it is not always clear whether their users actually infringe the right of reproduction because streaming data is only saved temporarily on the user’s computer. Section 13A allows temporary copies of works, if the only purpose of those copies is to enable the transmission of a work in a network between third parties by an intermediary or any

³²⁴ IP Unit, ‘Copyright Amendment Bill 2017 Comments’ (2017) 10, available at https://libguides.wits.ac.za/ld.php?content_id=33935202.

³²⁵ See Google SA ‘Submission on the Copyright Amendment Bill’ (2017), available at https://libguides.wits.ac.za/ld.php?content_id=33934566.

³²⁶ E Papadaki ‘Hyperlinking, making available and copyright infringement: lessons from European national courts’ (2017) 8 *EJLT* 3.

³²⁷ In EU copyright law Article 5(1) of the InfoSoc Directive provides for an exception for temporary/transient copies.

other lawful use of the work. Thus, this could be interpreted as allowing users to stream media. Then again, contributory or inducement liability would be difficult to substantiate due to a lack of direct infringement by the users of streaming services. However, the Bill does not state what ‘lawful use of the work’ means. In the *Filmspeler* case, the CJEU held that the end user, who deliberately and in full knowledge of the circumstances streams unauthorised copyrighted content, cannot rely on the exception for temporary acts of reproductions, since it does not constitute a lawful use of the work.³²⁸ Whether this also applies to streaming media, where the infringing nature is not apparent, is, however, unclear.

³²⁸ *Stichting Brein v Jack Frederik Wullems* EU (CJEU) C-527/15 at para 69.

CHAPTER 6: CONCLUSION AND SUGGESTIONS FOR SOUTH AFRICA

This thesis has scrutinised the liability for copyright infringement of streaming platforms and streaming box distributors in the EU, U.S. and in South Africa. With regard to streaming platforms, this thesis has examined the liability of UGC, file host, link-sharing and link-indexing streaming platforms separately. In all three jurisdictions link-sharing and link-indexing streaming platforms, which advertise the use of illegally hosted content or set up categories susceptible to infringements, are primary or secondary liable for copyright infringement. Other link-sharing and link-indexing platforms which adopt a more passive role may not be held liable. Here, it will be easier for platform operators to escape liability in the U.S. and South Africa, as these jurisdictions provide for a ‘linking’ safe harbour. At present, the liability of the more neutral UGC and file host streaming platforms under European and South African copyright law is unclear. In the light of the CJEU’s expansive interpretation of the scope of Article 3 of the E-Commerce Directive, such sites could be held liable for communicating works to the public. Under U.S. copyright law the legal situation in terms of UGC and file host streaming platforms has become clearer in light of recent case law. In *Viacom v. YouTube* and *Capitol Records v Vimeo* the U.S. Supreme Court of Appeal found that UGC streaming platforms can rely on the DMCA’s hosting safe harbour as long as they comply with the notice-takedown procedure and do not actively acknowledge or approve UGC. The liability of streaming box distributors has been addressed by the CJEU in its *Filmster* decision. Streaming box distributors are directly liable for communicating works to the public, if they install add-ons that give access to unauthorised streaming content. In the U.S., streaming box distributors are most likely not liable for direct copyright infringement but could be held liable as a secondary infringer under the principles of contributory infringement. South African copyright law would allow courts to establish the principles of contributory liability, thus, streaming box distributors could be held secondary liable. However, with the proposed introduction of the ‘communication to the public’ and ‘making available’ rights, South African courts could also follow the European approach and hold them liable for communicating works to the public.

As previously stated, there has been very little South African case law on copyright infringement online and no case law concerning streaming platforms. Therefore, the question remains how South African courts should deal with possible future cases.

South Africa has the benefit of being able to learn from the positive and negative examples of how the EU and the U.S. have dealt with the matter. On the one hand, the introduction of the ‘communication to the public’ right would suggest that South African courts take account of the case law of the CJEU. On the other hand, South African copyright law is broad enough to include the principles of contributory, vicarious and inducement liability developed by U.S. case law. With regard to legal certainty, the adoption of the CJEU expansive interpretation of Article 3’s right of ‘communication to the public’ does not seem appropriate. The CJEU has extended the scope of the ‘communication to the public’ right to the extent that even the sale of devices containing software linking to unlawfully uploaded content can constitute a direct infringement in form of communicating works to the public. There is much to be said that such conduct seems to be ‘wrong’ but this does not mean that it has to be considered a direct copyright infringement. Furthermore, the CJEU introduced the knowledge requirement within the scope of Article 3 of the E-Commerce Directive, which has no legal basis in the wording of Article 3, nor in the equivalent provisions of the Berne Convention or WCT³²⁹. In this context, one has to bear in mind that secondary liability is not harmonised on EU level due to a lack of consensus among the Member States.³³⁰ Thus, with its judgements in *Filmspeler* and *The Pirate Bay* the CJEU seems to overexpand the notion of communication to the public, in order to harmonise secondary liability on EU level. Finally, the CJEU has pointed out that the criteria established in precedent case law are mere guidelines and have to be applied against the background of the facts of the specific case, which also does not provide for much legal certainty and leaves streaming platform operators in the dark.

The approach of U.S. courts in terms of the liability of streaming platforms provides more legal certainty and balance. In terms of UGC streaming platforms, the Supreme Court has clarified and confirmed the safe harbours’ scope. With regard to link-sharing and link indexing platforms the ‘server test’ provides for a clear and understandable distinction between primary and secondary liability. Furthermore, unlike European copyright law, the DMCA’s safe harbours provide for an express limitation of liability for linking. However, it has to be noted that the principles of secondary liability as well as the ‘server test’ are judge made law.

³²⁹ Article 8 of the WCT

³³⁰ E Derclay *Research Handbook on the Future of EU Copyright Law* (2009) 212-241.

In South Africa limited case law exists in terms of online copyright infringement - the reasons for this are manifold but it cannot be expected that we are going to see substantially more litigation in this area in the foreseeable future. Therefore, with the aim to improve legal certainty and to foster internet investments of streaming platforms, it is suggested here that South Africa introduces into its copyright law a coherent and comprehensible system of intermediary liability, which also covers the various forms of streaming platforms. To achieve that, South Africa should implement into the Copyright Act of 1978 a provision that regulates secondary liability for copyright infringements.³³¹ Moreover, the lawmaker should revise the safe harbour provisions, in particular the requirement of being part of an industry representative body, to ensure that all UGC and link-indexing streaming platforms can benefit from the limitations, when they meet the general requirements of those provisions. With regard to the status of linking, South Africa could provide for more legal certainty and balance between the interests of right holders and platforms by implementing a definition of communication to the public that is based on the ‘server test’. However, this thesis suggests that a clear distinction is be made between push links (deep links and hyperlinks) and pull links (embedded and framed links). The former should not be considered a communication to the public, while the latter may qualify as a communication to the public.

³³¹ See, for example, a proposal for EU copyright law, F Schemkes *How to deal with a hyperlink: A proposal for harmonisation of secondary copyright infringement in the EU* LLM (2016) 59.

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